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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1137

ABE LAVINE, individually and in his capacity as Commissioner of the New York State Department of Social Services,

Appellant,

v.

RONALD MILNE, DOUGLAS STREETER, ROBERT C. LEE, JOE NATHAN BEVERLY, WILLIE BEVERLY, ODELL BEVERLY, and JOHN BEVERLY, by their mother and next friend, ROBERTA BEVERLY, individually and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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TABLE OF CONTENTS

Page

STATUTE AND REGULATION INVOLVED 1

QUESTIONS PRESENTED 3

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 40

ARGUMENT:

I. THE PRESUMPTION THAT PLAINTIFFS TERMINATED THEIR EMPLOYMENT FOR THE PURPOSE OF QUALIFYING FOR PUBLIC ASSISTANCE VIOLATES THE DUE PROCESS CLAUSE BECAUSE THERE IS NO RATIONAL CONNECTION BETWEEN THE GIVEN FACTS AND THE FACT PRESUMED BY THE STATUTE 47

II. DEFENDENT'S ENFORCEMENT OF NEW YORK SOCIAL SERVICES LAW, § 131(11) VIOLATES THE DUE PROCESS CLAUSE BECAUSE THE TIMING OF THE STATE'S FAIR HEARING PROCEDURE DEPRIVED PLAINTIFFS OF AN OPPORTUNITY TO REBUT THE PRESUMPTION PRIOR TO THE IMPOSITION OF THE SANCTION, AND DURING THE SEVENTY-FIVE DAY STATUTORY SANCTION PERIOD 88

A. The State's procedures did not afford plaintiffs a fair opportunity to rebut the presumption 89

B. Due process requires a hearing prior to the imposition of a seventy-five day sanction 96

C. Because of the State's failure to provide plaintiffs with timely hearings, the statutory rebuttable presumption operated as a conclusive presumption during the seventy-five day sanction period 107

Page

III. THE IMPOSITION OF A SEVENTY-FIVE DAY SANCTION ON THE BASIS OF THE PRESUMED FACTS IS ARBITRARY AND IRRATIONAL IN VIOLATION OF THE EQUAL PROTECTION CLAUSE 112

IV. THE CLASS SHOULD BE MODIFIED TO EXCLUDE PERSONS IN THE AFDC CATEGORY 122

CONCLUSION 123

APPENDIX "A" 1a

APPENDIX "B" 1b

APPENDIX "C" 1c

TABLE OF AUTHORITIES

Cases:

Adler v. Board of Education, 342 U.S. 485 (1952) .... *passim*

Armstrong v. Manzo, 380 U.S. 545 (1965) 97,98

Arnett v. Kennedy, 416 U.S. 134 (1974) ..... *passim*

Arteaga v. Silverman, 56 Wis.2d 110, 201 N.W.2d 538 (1972) 56,61

Atlantic Coast Line R.R. v. Ford, 287 U.S. 502 (1933) 52,53

Bailey v. Alabama, 219 U.S. 219 (1911) 53,65,90

Bandini Petroleum Co. v. Superior Court, 284 U.S. 8 (1931) 53,89

Bank of United States v. Dandridge, 25 U.S. (12 Wheat.) 64 (1827) 51

Barnes v. United States, 412 U.S. 837 (1973) .. 52,54,55,56,65

Baxstrom v. Herold, 383 U.S. 107 (1966) 115

Bell v. Burson, 402 U.S. 535 (1971) 90,97,105,108,111

Board of Regents v. Roth, 408 U.S. 564 (1972) 97,98

Page

Bratton v. Chandler, 260 U.S. 110 (1922) 97

Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) 98

Carleson v. Remillard, 406 U.S. 598 (1972) 122

Cisco v. Lavine, 72 Misc.2d 1009, 340 N.Y.S.2d 275, *modified on reargument*, 72 Misc.2d 1087, 341 N.Y.S.2d 719 (Sup.Ct. 1973) 93,94

City of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837) 66

Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974) 44,108,109,110

District 65, Wholesale Union v. Nixon, 341 F.Supp. 1193 (S.D.N.Y. 1972) 60

Edwards v. California, 314 U.S. 160 (1941) 65

Felton v. United States, 96 U.S. 699 (1878) 118

Flemming v. Nestor, 363 U.S. 603 (1960) 97

French v. Edwards, 80 U.S. (13 Wall.) 506 (1872) 51

Fresh v. Gilson, 41 U.S. (16 Pet.) 327 (1842) 51

Frontiero v. Richardson, 411 U.S. 677 (1973) 75,115,121

Fuentes v. Shevin, 407 U.S. 67 (1972) 97,98,99

Fusari v. Steinberg, 419 U.S. 379 (1975) 98,101

Gaddis v. Wyman, 304 F.Supp. 713 (S.D.N.Y. 1969) 56

Gaddis v. Wyman, 304 F.Supp. 717 (S.D.N.Y. 1969), *aff'd sub nom, Wyman v. Bowens*, 397 U.S. 49 (1970) 48

Gaddis v. Wyman, 336 F.Supp. 1225 (S.D.N.Y. 1972) 13

Garcia v. Silverman, 393 F.Supp. 590 (E.D.Wis. 1975) 56,59

Goldberg v. Kelly, 397 U.S. 254 (1970) ..... *passim*

Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926) 97

	Page
Goss v. Lopez, 419 U.S. 565 (1975)	98,101,106,116
Great Atlantic & Pacific Tea Co. v. Ervin, 23 F. Supp. 70 (D. Minn. 1938) (three-judge court)	118
Greene v. McElroy, 360 U.S. 474 (1959)	105
Greer v. United States, 245 U.S. 559 (1918)	53,54
Hagans v. Lavine, 415 U.S. 528 (1974)	122
Hawes v. Georgia, 268 U.S. 178 (1922)	53
Hawk v. Fenner, 396 F.Supp. 1 (D.S.D. 1975)	120
Heiner v. Donnan, 285 U.S. 312 (1932)	89
Home Insurance Co. v. Weide, 78 U.S. (11 Wall.) 438 (1871)	51,54
Hornsby v. Allen, 326 F.2d 605, *adhered to on rehearing*, 330 F.2d 55 (5th Cir. 1964)	97
Jimenez v. Weinberger, 417 U.S. 628 (1974)	*passim*
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951)	98
Jones v. Berman, 37 N.Y.2d 42, 371 N.Y.S. 2d 422 (1975)	94
Kelly v. Wyman, 294 F.Supp. 893 (S.D.N.Y. 1968) (three-judge court)	103
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)	54,97
King v. Smith, 392 U.S. 309 (1968)	46,122
Knowles v. Lavine, 42 App.Div.2d 742, 346 N.Y.S. 2d 296 (2d Dept. 1973), *rev'd on other grounds*, 34 N.Y.2d 721, 356 N.Y.S. 2d 864 (1974)	69
Lascaris v. Wyman, 31 N.Y.2d 386, 340 N.Y.S. 2d 397 (1972)	71
Laskey Bros. of W.Va. v. Warner Bros. Pictures, 224 F.2d 824 (2d Cir. 1955), *cert. denied* 350 U.S. 932 (1956)	50,87
Leary v. United States, 395 U.S. 6 (1969)	54,55,74
Lewis v. Martin, 397 U.S. 552 (1970)	46,122

	Page
Lindsey v. Normet, 405 U.S. 56 (1972)	115
Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911)	89
McFarland v. American Sugar Refining Co., 241 U.S. 79 (1916)	53,55
Manley v. Georgia, 279 U.S. 1 (1929)	53,89
Manning v. John Hancock Mutual Life Ins. Co., 100 U.S. 693 (1879)	51
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)	100
Milne v. Berman, 384 F.Supp. 206 (S.D.N.Y. 1974) (three-judge court)	*passim*
Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974)	101,105
Mobile, J. & K.C.R.R. v. Turnipseed, 219 U.S. 35 (1910)	*passim*
Mooney v. Pickett, 4 Cal.3d 669, 483 P.2d 1231, 94 Cal.Rptr. 279 (1971)	61
Morrissey v. Brewer, 408 U.S. 471 (1972)	98
Morrison v. California, 291 U.S. 82 (1934)	53,65
Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973)	110
Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950)	97
Mullaney v. Wilbur, 95 S.Ct. 1881 (1975)	54
Nash v. Florida Industrial Commission, 389 U.S. 235 (1967)	99
Nelson v. Sugarman, 361 F.Supp. 1132 (S.D.N.Y. 1972)	93,94
New York State Board of Social Welfare v. City of Newburgh, 28 Misc.2d 539, 220 N.Y.S. 2d 54 (N.Y. Sup.Ct. 1969)	76

Page

New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973) 66,76,77,114

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 54

North Georgia Finishing Co. v. Di Chem, 419 U.S. 601 (1975) 101

Owens v. Roberts, 377 F.Supp. 45 (M.D.Fla. 1974) (three-judge court) ..... *passim*

Oyama v. California, 332 U.S. 633 (1948) 90

Peonage Cases, 123 F.671 (M.D.Ala. 1903) 57

Perez v. Lavine, 378 F.Supp. 1390 (S.D.N.Y. 1974) 73,105

Pollock v. Williams, 332 U.S. 4 (1944) 57

Reed v. Reed, 404 U.S. 71 (1971) 45,115,120

Ricard v. Williams, 20 U.S. (7 Wheat.) 59 (1822) 52,55

Richardson v. Perales, 402 U.S. 389 (1971) 111

Roller v. Holly, 176 U.S. 398 (1900) 91

Rothstein v. Wyman, 303 F.Supp. 339 (S.D.N.Y. 1969), *vacated and remanded*, 398 U.S. 275 (1970) 70

In re Ruffalo, 390 U.S. 544 (1968) 91

Shapiro v. Thompson, 394 U.S. 618 (1969) 65,100

Shea v. Vialpando, 416 U.S. 251 (1974) 122

Silver Chrysler Plymouth Inc. v. Chrysler Mot. Corp., 518 F.2d 751, 754 (2d Cir. 1975) 50

Smith v. Illinois Bell Telephone Co., 270 U.S. 587 (1926) 106

Snell v. Wyman, 281 F.Supp. 853 (S.D.N.Y. 1968) *aff'd*, 393 U.S. 323 (1969) 68,70

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Page

Speiser v. Randall, 357 U.S. 513 (1958) 50,54

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Torres v. New York State Department of Labor, 32 F.Supp. 432 (S.D.N.Y. 1971) (three-judge court), *vacated and remanded*, 402 U.S. 968 (1971) 100

Tot v. United States, 319 U.S. 463 (1943) 52,53,54,55

Turner v. United States, 396 U.S. 398 (1970) 54,55,65,74

United States v. Adams, 293 F.Supp. 776 (S.D.N.Y. 1968) 55

United States v. Black, 512 F.2d 864 (9th Cir. 1975) 54

United States v. Gainey, 380 U.S. 63 (1975) 54,55,65,74

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Vlandis v. Kline, 412 U.S. 441 (1973) 44,108,109,110

Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972) 118

Weinberger v. Salfi, 95 S.Ct. 2457 (U.S. 1975) 110,111,115,121

Western & A.R.R. v. Henderson, 279 U.S. 639 (1929) 43,52,53,89

Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) 90,97

In re Winship, 397 U.S. 358 (1970) 102

Wolff v. McDonnell, 418 U.S. 539 (1974) 91,92

Yee Hem v. United States, 268 U.S. 178 53

Yee-Litt v. Richardson, 353 F.Supp. 996 (W.D.Cal. 1973), *aff'd sub nom*, Carleson v. Yee-Litt, 412 U.S. 924 (1973) 102

Page

Federal Provisions:

28 U.S.C. § 1343(3) 37
§ 2281 37
§ 2284 37

42 U.S.C. § 601, *et seq.* 122
§ 633(g) 105
§ 1983 37

29 C.F.R. § 570 105

45 C.F.R. § 205.1 105
§ 205.10 93

Civil Rules of the Southern and Eastern Districts of New York, Rule 9(g) 95

Federal Rules of Civil Procedure
Rule 23(b)(2) 39
Rule 23(c)(1)(4) 123

State Provisions:

N.Y. Constitution, Art. XVII, § 1 106,109

N.Y. Labor Law
§ 652(d) 31
§ 652(e) 31
§ 652(f) 31

New York Social Services Law
§ 17 13
§ 20 13
§ 34 13
§ 104 68
§ 104(1) 69
§ 104-a 113
§ 105 68
§ 106-b 111
§ 131(1) 109
§ 131(4) 66
§ 131(11) ..... *passim*
§ 131-a(1) 14,31,69,109

Page

§ 132 112,113
§ 133 5,95,99
§ 157 109
§ 158 46,109
§ 158(b) 113
§ 164 109
§ 166 5,43,93,106
§ 350-j 94
§ 360 68

18 N.Y.C.R.R. Part 350 90

18 N.Y.C.R.R. Part 351 44,72,90,112
§ 351.1(a) 113
§ 351.2 44,113

18 N.Y.C.R.R. Part 352 112
§ 352.3(a) 69
§ 352.11 113
§ 352.12 113
§ 352.15 113
§ 352.15(d) 69
§ 352.16 68,69,113
§ 352.17 113
§ 352.19 113
§ 352.27 68,69
§ 352.28(b) 68,69

18 N.Y.C.R.R. Part 358 5,43,93
§ 358.4 106,109
§ 358(c)(1) 94
§ 358.18 5,16,43,93
§ 370.4(h)(2) 48
§ 385.6 61,62
§ 385.7 ..... *passim*

New York Laws 1824, c.331(v) 32,67

Legislative History:

2 McKinney N.Y. Session of Laws of 1971
2510 74
2511 74
2636 74

Page

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Page

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Page

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Page

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BRIEF FOR APPELLEES

STATUTE AND REGULATION INVOLVED

The three-judge court enjoined the enforcement of the second sentence of Section 131(11) of the New

York Social Services Law and its regulatory counterpart, 18 N.Y.C.R.R. 385.7(b). The second sentence of Section 131(11) provides:

> "Any person who applies for home relief or aid to dependent children or requests an increase in his grant within seventy-five days after voluntarily terminating his employment or reducing his earning capacity *shall*, unless otherwise required by federal law or regulation, *be deemed to have voluntarily terminated his employment* or reduced his earning capacity *for the purpose of qualifying for such assistance* or a larger amount thereof, in the absence of evidence to the contrary supplied by such person." *N.Y. Social Services Law*, § 131(11) (McKinney Supp. 1974). (Emphasis added).[1]

The regulation of the New York State Department of Social Services which implements the second sentence of Section 131(11) provides, in relevant part:

> "385.7 Sanctions . . . . (b) Any person who applies for HR or requests an increase in his grant, within 75 days after voluntarily terminating employment or reducing his earning capacity or similarly within

---

[1] The first sentence of Section 131(11), which is not in issue in this case, provides:

> "Any person who voluntarily terminated his employment or voluntarily reduced his earning capacity *for the purpose of qualifying for home relief* or aid to dependent children or a larger amount thereof shall be disqualified from receiving such assistance for seventy-five days from such termination or reduction, unless otherwise required by federal law or regulation." *N.Y. Social Services Law*, § 131(11) (McKinney Supp. 1974). (Emphasis added).

> 30 days for ADC, shall be deemed to have voluntarily terminated employment or reduced his earning capacity for the purpose of qualifying for such or larger amount thereof in the absence of evidence to the contrary supplied by such person." 18 N.Y.C.R.R. § 385.7 (1974).

QUESTIONS PRESENTED

1. Whether a statutory presumption that every person who applies for public assistance within seventy-five days after voluntarily terminating employment "shall be deemed to have voluntarily terminated his employment for the purpose of qualifying for . . . assistance . . . in the absence of evidence to the contrary supplied by such person," lacks a rational connection between the given facts and the presumed motive, in violation of the Due Process Clause.

2. Whether plaintiffs were denied a fair opportunity to rebut the statutory presumption that they left their employment for the purpose of qualifying for public assistance, in violation of the Due Process Clause, where the hearings at which they might rebut the presumption were generally not decided until well into and in some cases even after the end of the seventy-five day sanction period.

3. Whether the imposition of the seventy-five day sanctions on the basis of the statutory presumption that plaintiffs terminated their employment for the purpose of qualifying for public assistance arbitrarily and irrationally deprived plaintiffs of needed public assistance in violation of the Equal Protection Clause.

4. Whether the plaintiff class properly included persons in the federal Aid to Families With Dependent Children category.

STATEMENT OF THE CASE

Plaintiffs-appellees (hereafter "plaintiffs") were needy, individuals who were disqualified from receiving any Home Relief assistance for two and one-half months (75 days) by agents of the New York State Department of Social Services.[2] These sanctions were imposed due to the enforcement of the statutory presumption that plaintiffs terminated their employment for the specific purpose of qualifying for Home Relief assistance. *N.Y. Social Services Law*, § 131(11) (McKinney Supp. 1974); 18 N.Y.C.R.R. § 385.7(b). The statute provides that every person who applies for Home Relief assistance within seventy-five days of employment termination is "deemed to have voluntarily terminated his employment . . . for the purpose of qualifying for such assistance . . . in the absence of evidence to the contrary supplied by such person." *Id.*

The record substantiates that not even one of the twenty-one plaintiffs whose facts were before the court below *in fact* terminated his or her employment for the purpose of qualifying for Home Relief assistance. Because plaintiffs were presumed to have

[2]Home Relief is New York's program for general assistance. "Every state has a program of general assistance separate and distinct from [federal] categorical assistance programs." Note, 25 Hastings L.J. 678, 680 (1974).

terminated their employment for the purpose of qualifying for Home Relief assistance, the seventy-five day sanctions created by the first sentence of Section 131(11) were imposed against them, even though they terminated their employment for ordinary purposes.

Plaintiffs were not afforded hearings prior to the imposition of the seventy-five day sanctions. The only opportunity they had to rebut the statutory presumption was at "fair hearings" offered by the defendant-appellant (hereafter "defendant") Commissioner of the New York State Department of Social Services. *N.Y. Social Services Law*, § 166 (McKinney Supp. 1974); 18 N.Y.C.R.R. Part 358. However, these hearings need not be decided for ninety days, 18 N.Y.C.R.R. 358.18, and in fact they were not decided until long into and in some cases even after the end of the seventy-five day sanction period. Pending the fair hearing decisions, New York State law precluded the granting of emergency assistance to plaintiffs. *N.Y. Social Services Law*, § § 131(11), 133 (McKinney Supp. 1974). (*See* A. 480-481, 578).

The imposition of the seventy-five day sanctions based on the statutory presumption caused the plaintiffs grave and irreparable injury. Many were left without the means to pay their rent and buy food and other necessities. Several went hungry and were threatened with eviction.

STATEMENT OF FACTS

A. Plaintiffs

1. Plaintiff Ronald Milne

Plaintiff Ronald Milne is a resident of Yonkers, New York, who had been regularly employed for seventeen years. (A.10,18,247,264). Milne worked for the New York State Armory in Yonkers for four years; he worked for the Phelps Dodge Company for twelve years; and he worked as a security guard for Columbia University in New York City for more than a year, until November 2, 1973. (A.10,18,247,264,271).

On November 2, 1973, Milne was suspended without pay from his job. His supervisor notified him that he would be discharged for allegedly being intoxicated and away from his post. (A.10,18,247,264,271). Milne contested his dismissal by invoking union grievance procedures. (A.10,11,18-19,247,264). At an initial grievance proceeding held November 5, 1973, the decision to dismiss Milne was upheld. (A.11). Milne appealed. (A.11). At a second grievance proceeding, Milne was told that if he would submit a letter of resignation, his employment record at Columbia University would be cleared of any reference to allegations of misconduct or attempts to dismiss him, and that if he did not resign, he would be discharged. (A.11, 18-19,247,264,577). Milne decided to resign, upon the advice of his union representative, to avoid the stigma of being fired and to enhance his prospects for finding new employment. (A.11,18-19,247,265,267-268,577). Milne submitted a handwritten, pre-dated letter of resignation to his supervisor. (A.11,19,28,247,265). In his letter, Milne stated:

> "I Ronald Milne a guard with Columbia University am resigning as of November 9th for personal reasons also to better myself with less travel." (A.28).

After submitting his letter of resignation, Milne unsuccessfully searched for new employment. (A.11, 265). By November 16, 1973, he stated:

> "... I had exhausted my savings, was unable to find a new job and I was unable to provide myself with the necessities of food and lodging. I applied for Unemployment Compensation at the New York State Department of Labor." (A.265).

The Department of Labor denied his application for unemployment insurance benefits upon the ground that he had allegedly provoked his own discharge. (A.266, 270-271).[3] Milne finally went to the Yonkers office of the Westchester County Department of Social Services ("local agency") to request public assistance to pay for his food and rent. (A.11,18,247,265). A "certification examiner" denied his request in a written notice which stated, in part:

---

[3] Milne appealed the denial of his unemployment benefits, but his Department of Labor hearing was not held until December 21, 1973, and was not decided until January 3, 1974. (A.266,268,270-271). Milne prevailed at the hearing, but did not begin to receive unemployment benefits until January 17, 1974, seventy-six days after his employment termination. In his decision, the Unemployment Insurance Hearing Referee found that:

> "It is significant to note herein that the employer presented no evidence of substantive force and probative effect to establish its contention that claimant [Milne] was intoxicated and off his post during working hours." (A.270-271).

"Your application for public assistance has been denied for the following reasons:
As per your application, you resigned from your job at Columbia University on 11/2/73. *A 75 day sanction* is in effect from 11/2/73 - 1/15/74 before you would be eligible for a public assistance grant. If you are not satisfied with this decision you have the right to ask for a fair hearing." (A.29) (Emphasis added).

Milne's counsel attempted in vain to convince the certification examiner that Mr. Milne should not have been sanctioned under the provisions of Section 131(11) of the New York Social Services Law because he did not resign from his job for the purpose of qualifying for public assistance. (A.11-12,20,272-275). The Deputy Commissioner for Legal Affairs of the local agency, a lawyer, also approved the determination to impose the 75 day sanction. (A.12,20,275).

A request by Milne's counsel for an expedited "Fair Hearing" was refused by the State Commissioner's agents on December 13, 1973. (A.22,250,275).[4]

Milne commenced this action on December 19, 1973. (A.1). By December 28, 1973, Milne was eating only

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[4]Milne wanted to show at his hearing that he did not resign in order to qualify for public assistance, that his salary prior to his resignation was higher than public assistance benefits, that he had worked steadily for seventeen years before his resignation, that he resigned only after fighting for his job through two stages of a grievance procedure (and only after being threatened with dismissal) and that he resigned upon the advice of his union representative in order to improve his future employment prospects. (A.267-268).

one meal a day, his rent was overdue, his utility bills were unpaid, and he feared eviction. (A.12-13).[5]

On January 2, 1974, the District Court made an order to show cause why a preliminary injunction should not issue restraining defendants from enforcing the challenged statute against Milne. (A.8-9,101). On January 9, 1974, before a hearing on the pending order to show cause was held, the Westchester County Commissioner finally "reconsidered his decision and determined Milne to be eligible for assistance from the date [November 16, 1973] when his application was rejected." (A.505) (See also A.101; Brief for Appellant, Page 10; Jurisdictional Statement, Page 9.)[6] Defendant's agent, the local commissioner, thus "conceded his error" in subjecting Milne to the sanction for more than fifty days. (Brief for Appellant, Page 10).

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[5]Milne had been a building superintendent for his landlord for nine years, and he received a forty-percent reduction in rent in exchange for his services. (A.12). On December 28, 1973, Milne was two months behind in his rent payments, and another month's rent was due January 1, 1974. (A.12).

[6]Monetary assistance that had been withheld from Milne for fifty-four days was authorized by the Westchester County Commissioner on January 9, 1974. (A.250,268). Milne's motion for a preliminary injunction scheduled to be heard January 11, 1974, (A.33), was then withdrawn without prejudice, pursuant to a stipulation "so ordered" by the District Court. (A.33-34,101). Milne returned two public assistance checks to the Westchester County Department of Social Services after he began receiving his unemployment insurance benefits on January 17, 1974. (A.269,547-548).

2. Intervenor-Plaintiff Douglas Streeter

Douglas Streeter is a resident of Port Chester, New York. (A.276). He worked for the Life Saver Company in Port Chester as a "hop filler" on an assembly line from August 30, 1973 until October 15, 1973. (A.251,276).[7] On October 14, 1973, Streeter was told by his employer that the Life Saver Company had adopted a new rule forbidding its employees to wear beards. (A.251,276,577). Streeter's beard could not be shaved without difficulty due to an extremely sensitive skin condition. (A.251,276). He offered to wear a mask, but his employer said that if Streeter would not shave he need not report for work. (A.251,277,577). Rather than be fired, Streeter did not report to work at the Life Saver Company on October 15, 1973, and he began to look for a new job. (A.251,277).

By October 30, 1973, Streeter had not found new employment, he had exhausted all his savings, and he could not afford to pay for his food and rent. (A.205,251,277). On October 31, 1973, Streeter applied for public assistance. (A.58,205-206,251,277). According to an inspector in the Quality Control Bureau of the Department of Social Services of the County of Weschester,

> "On October 31, 1973, Mr. Streeter was advised in writing by the Department of Social Services that his application for public assistance had been denied because he had terminated his employment but that he would be eligible to reapply *after a sanction period of seventy-five (75) days* on December 30, 1973." (A.58) (Emphasis added).

[7]Streeter had previously attended college for about three years but he could not complete his studies for financial reasons. (A.276).

On December 5, 1973, Streeter found new employment as an orderly at a Port Chester nursing home. (A.52,58,206,251,277). However, Streeter was discharged on January 4, 1974 for allegedly not informing his employer that he could not report for work because he was ill. (A.53,58-59,206,251-252,277-278,577). Streeter looked for new employment without success. (A.53,206,252,278).

By January 13, 1974, Streeter had no money for food and his January rent was unpaid. (A.53, 206,252,278). He requested public assistance on that date at the local agency. (A.53-54,58,206,252,278). An agency employee told Streeter that he could not receive assistance for 75 days because he allegedly provoked his own discharge. (A.53-54). On January 14, 1974, Streeter then applied for but did not receive unemployment insurance benefits because he had not worked the requisite number of weeks. (A.278).

On January 17, 1974, Streeter received a written notice of denial of his application for public assistance. (A.54). The notice stated in part:

> "You were terminated from your employment at Port Chester Nursing Home on December 28, 1973. *You are being sanctioned for 75 days* and may reapply on April 13, 1974.
> If you are not satisfied with this decision, you have the right to ask for a Fair Hearing." (A.282) (Emphasis added).

Streeter next went for help to the Carver Center, a private social agency in Port Chester, where a social worker called the Department of Social Services to

request the assistance Streeter needed to pay for his food and rent. (A.279). Streeter was finally referred by the Carver Center worker to the Legal Aid Society on January 24, 1974, after the Department of Social Services refused to reconsider the imposition of the 75 day sanction. (A.279).

On January 25, 1974, the District Court issued an order to show cause why Streeter should not be permitted to intervene, and temporarily restrained the enforcement of the challenged provisions against Streeter. (A.49-51,102). Streeter then received from the Westchester County Department of Social Services a grant to help pay for his rent, and eleven dollars with which to buy food for ten days. (A.280).

A "fair hearing" was requested by Streeter on January 28, 1974. It was first scheduled to be held February 28, 1974, but it was adjourned over Streeter's protest to March 20, 1974. (A.280-281). The District Court granted Streeter's motion for leave to intervene as a plaintiff on March 27, 1974. (A.200-201).

On April 4, 1974, sixty-six (66) days after Streeter's request, and more than ninety (90) days after his employment termination, the State Commissioner rendered a "Decision After Fair Hearing" reversing the local agency decision to impose the 75 day sanction against Streeter and finding him eligible for Home Relief assistance. (A.459-460).

In his decision, the State Commissioner said:

> "(1) Appellant applied for Home Relief on January 13, 1974, and is currently in receipt of assistance pursuant to a Federal Court order. On January 16, 1974, *the agency determined to deny appellant's assistance because he terminated his employment for the purpose of qualifying for public assistance.*

> (2) On January 2, 1974, the appellant was terminated from his employment because he failed to report for work on December 31, 1973. However, he did provide a valid reason for failing to report to work. Appellant was ill and so notified his employer.
>
> * * *
>
> The credible evidence establishes that appellant failed to report for work because he was ill. The evidence further establishes that appellant was surplus labor for the job and that was the reason for his employment being terminated. Accordingly, the agency erred in denying public assistance to appellant." (A.459-460) (Emphasis added).

Thus the State Commissioner agreed that Douglas Streeter had been sanctioned erroneously by his agents.[8]

3. Intervenor-Plaintiff Robert C. Lee

Robert C. Lee was 25 years old and lived alone in Mount Vernon, New York. (A.64,78). Lee had been steadily employed since 1967. (A.63). He worked as a machinist making "JIC jig tools" for telephone communications equipment. (A.63). His pay as a machinist was $3.35 per hour; his monthly take home pay was about $470.00. (A.63,78).[9]

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[8] Employees of local social services departments act as agents of the State Commissioner. *N.Y. Social Services Law*, § § 17, 20, 34 (McKinney Supp. 1974). *See Gaddis v. Wyman*, 336 F. Supp. 1225, 1227 (S.D.N.Y. 1972).

[9] Home Relief assistance provides $94 per month plus a rent allowance to a single individual without any income. *N.Y. Social*

On November 18, 1973, Lee was injured in an automobile accident. (A.63,254). On January 14, 1974, Lee's employment was terminated because of absences which resulted from his injuries. (A.64,71,254).

After losing his job, Lee looked for new work without success. (A.64). By January 29, 1974 Lee had no more money with which to purchase food. (A.64-65,78,254). He owed $360.00 in back rent since being injured in the auto accident in November, 1973. (A.64-65,70,254). Lee applied for Home Relief assistance on January 29, 1974, and told persons at the local agency that he desperately needed assistance. (A.64,78,254,505-506,510). He was not given any assistance, but was told to return the next day for an interview. (A.64,78,254). On January 30, 1974, a case worker at the local agency told Lee that there was nothing that she could do, because he had to wait until 75 days passed after termination of his employment before he could be eligible for any assistance. (A.64-65,78,254). Lee demanded to talk with a supervisor, who also refused to authorize any assistance but who told Lee to obtain a letter from his former employer. (A.65,71,78-79). Lee submitted to the local agency the requested letter and a letter from his landlord threatening him with eviction. (A.65,71). On January 31, 1974, Lee's application for assistance was denied, pursuant to a written notice which stated, in part:

> "Your application for public assistance has been denied for the following reasons:

Services Law, §131-a (McKinney Supp. 1974). The maximum shelter allowance payable for one person in 1973 in Westchester County was $155. (Westchester County Caseworker's Manual of Assistance, Page A-4). The maximum amount of public assistance payable to Lee thus was $249 per month.

> Your employment was terminated due to the following reasons: Combination of excused and unexcused lateness and absenteeism.
>
> If you are not satified with this decision, you have the right to ask for a fair hearing . . . ."

Lee described his dialogue with the supervisor at the local agency as follows:

> "I asked the supervisor, 'what do I need that would make me eligible,' and 'what do I have to do in order to get some help.' The supervisor told me that there was nothing I could do, because he knew all he needed to know . . . . He said I should go to the Legal Aid Society." (A.65-66).

Because he was destitute and his requests for assistance had been denied, Lee could not afford to eat. (A.66,82,254-255). On January 29, 1974, Lee had eaten only lettuce; on January 30, 1974, he had only a doughnut and tea. On January 31, 1974, he suffered dizzy spells and cramps in his stomach, and had nothing to eat until his counsel loaned him money for a meal. (A.66).

On February 1, 1974, the District Court issued a temporary restraining order and an order to show cause to hear Lee's motions to intervene as a plaintiff and for preliminary injunctive relief. (A.60-62,102). After being restrained from enforcing the challenged statute against Lee, the local agency granted him assistance. (A.450). Lee's motion to intervene was granted by an order dated March 27, 1974. (A.200-201).

A "fair hearing" was first scheduled for Lee by the State Commissioner for April 4, 1974, about two months after his counsel's request for an expedited hearing, (A.81,255,578), and more than 75 days from

the date of his employment termination. (A.255,578). Lee's hearing was adjourned and never completed, (A.450,555; Jurisdictional Statement, 10), apparently because he received benefits for the remainder of the statutory sanction period after the restraining order was issued by the District Court.[10]

4. Intervenors-Plaintiff Joe, Willie, Odell, and John Beverly

Joe, Willie, Odell and John Beverly are four brothers who were 23, 20, 18, and 17 years of age, respectively. (A.150,156,161). They were irregularly employed until January 11, 1974 as laborers at the Emerson Poultry Farm near Middlesex, in Yates County, New York, receiving wages of $2.00 per hour. (A.150, 156,161,461,466,473).[11]

On January 10, 1974, the brothers and a sister with whom they lived were evicted from their home near the

[10]The time lapse in scheduling Lee's hearing was not unusual, and was within the 90 day limit allowed under 18 N.Y.C.R.R. § 358.18. The three-judge court described such a time lapse as making the hearing offered to plaintiffs a "totally meaningless" opportunity for a hungry person like Lee to rebut the presumption and avoid the sanction. *Milne v. Berman*, 384 F.Supp. 206, 211 n.5 (S.D.N.Y. 1974). (A.577).

[11]The brothers' former employer testified at their fair hearing, "Joe worked pretty steady for us right along, and some of these other boys here; Odell and John, they were in school .... You know, they were in school, out of school. Some days they would work, and some they wouldn't .... But Joe was the one that was the regular worker." (A.469).

Emerson Poultry Farm. (A.150,156,161,186,466). All five persons moved to their mother's two room apartment in Geneva, New York, about eighteen miles from the poultry farm, and a few days later the four brothers moved to the two room apartment of another sister in Canandaigua, New York, about fifteen miles from the farm. (A.151,157,162,466). The brothers terminated their employment because none of them had a car, or a driver's license, and there was no public transportation available to take them to the farm from Canandaigua. (A.151,157,162,466).

The brothers unsuccessfully tried to find new work in Canandaigua,[12] and they could not find suitable housing to relocate near the poultry farm. (A.151,153, 157,158,162,164,171,467,471-473).[13]

[12]Joe Beverly did find a temporary job with a janitorial service in Canandaigua, which lasted only from February 22 to February 28, 1974). (A.153).

[13]Odell and John Beverly said: "It was especially hard [for us to find a new apartment] because we are black and there are very few black people in that area." (A.162). The State Commissioner found that "[a]n officer of the Emerson Poultry Company testified that there was a house trailer available to rent ... and in addition the employer agreed to advance the appellant ... the first two months' rent on the aforementioned trailer." (A.461-462). The employer testified, in part, "[s]ometimes, I guess, they had a trailer that was available for the boys at one time .... When they called this morning ... I said, 'well, I better find out about the trailer?' ... I called the people-my golly, they rented the trailer." (A.467). The employer also testified that the Beverlys would have been expected to repay any advance for a house trailer. (A.472). John Beverly testified that he already was in debt to Mr. Emerson, and that he and his brothers could not afford the monthly cost of living in a trailer. (A.473).

Joe, Odell and John Beverly went to the Canandaigua office of the Ontario County Department of Social Services because they were destitute and their sister could not afford to continue to house and support them. Their requests for emergency assistance were orally denied, and they were told to return separately on January 29, 30 and 31, 1974. (A.151-152; 162-163,188,462). Joe was denied assistance on January 29, 1974, without written notice of the reason, and his brothers, after learning of Joe's denial, did not return. (A.152,163,189,451,475). They were later provided temporary shelter by a family receiving public assistance, and they received some temporary assistance for food from the St. Vincent de Paul Society. (A.152, 157,189).

On February 20, and 22, 1974, all of the brothers returned to the local agency, and they again requested assistance. They were told that they could not receive aid for 75 days from the date of their last employment. At the insistence of a volunteer worker, a written denial notice was provided by the local agency on February 25, 1974. (A.152,157-158,163-164,169-170,173-174, 189-190). The notice stated in part:

> "Your application for public assistance has been denied because you quit your job without good cause.
>
> If you believe this action should not be taken, you may request a state fair hearing . . ." (A.173,174).

On February 25, 1974, an expedited "fair hearing" was requested for the brothers. (A.172). A hearing was held on March 14, 1974. (A.284-285,463-478). The District Court issued an order to show cause and an order temporarily restraining enforcement of the

challenged statute on March 15, 1974 pursuant to which the Beverlys received assistance. (A.147-149). The Court later granted the Beverlys' motion to intervene. (A.214-215).

The State Commissioner rendered his "Decision After Fair Hearing" on March 28, 1974, 31 days after the request, about 75 days after the Beverlys left their employment. He found that the Beverlys voluntarily left their employment, explicitly relied upon the challenged statutory presumption, and affirmed the local agency's imposition of the 75 day sanction. (A.461,462,517).

B. Applicants for Intervention

1. Roy Levee

Roy Levee is a resident of New York City. (A.38.). He had picked orders in the warehouse of a Brooklyn company until about December 10, 1973. On that date he was discharged because he had missed several days of work due to his wife's illness. (A.38-39).[14] Levee tried to find new employment, and he reported weekly to his union in the hopes of finding work, without success. (A.39,42).

Because Levee was unable to pay his rent, his landlord obtained a judgment of eviction against him on January 15, 1974. The warrant of eviction was stayed by the landlord-tenant court until January 21, 1974, to

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[14]Levee previously received public assistance from about March 1, 1973 to August 1, 1973, when he found the warehouse job and requested the local agency to close his case. (A.38).

provide Levee with a final opportunity to pay his rent. (A.39,43). Levee was destitute. (A.39).

At the time, Levee was under the supervision of the New York State Narcotics Addiction Control Commission (NACC). (A.39). Upon learning of Levee's predicament, his NACC aftercare officer wrote a letter to the New York City Department of Social Services ("local agency") requesting it to provide public assistance to Levee. (A.39).

On January 15, 1975, Levee went to the local agency with the letter from his NACC officer and the eviction judgment, but his application for assistance was rejected. (A.39-40,43-44). His denial notice stated, in part:

> "After careful consideration of your application for Public Assistance, we find that you are ineligible for the following reasons:
>
> You have provoked the firing of your position and are therefore ineligible for Public Assistance for 75* days . . . ,
>
> *You will be eligible to reapply on 2/19/75." (A.44).

A fair hearing was requested by Levee's counsel, but the State Commissioner's agents refused her request to expedite it. (A.39-40,258,309). On January 21, 1974, the District Court issued an order to show cause and temporarily restrained enforcement of the 75 day sanction pending a hearing on Levee's motions for leave to intervene and for a preliminary injunction. (A.35-37,101-102,258). Levee was provided assistance to avert his eviction. The local agency then "reconsidered its decision." (A.452). On January 25, 1974, the return date of the order to show cause, counsel for the local agency represented to the Court that Levee would

no longer be disqualified pursuant to Section 131(11), and the District Court then denied Levee's motions. (A.101,102,104,258,308,452).

2. Shirley Miller

Shirley Miller was thirty-five years of age and worked as a part-time housekeeper for fifty dollars per week. (A.89). Between December 18 and December 28, 1974, she missed several days work because she had an abortion. (A.90-91,96-99). Miller was discharged by her employer because of her absences. (A.90). She looked for new work and reported to the New York State Department of Labor for a job referral, without success. (A.90).

Two hundred fifty dollars behind in her rent payments, and without any income or resources, Miller requested public assistance with the help of a legal services office investigator on January 22, 1974. (A.90).[15] The Dutchess County Department of Social Services denied her application for assistance pursuant to the challenged statute. (A.89-91). Efforts of Miller's counsel to persuade the local agency that Miller did not quit her job in order to qualify for public assistance were unsuccessful. (A.91).

On February 15, 1974, the District Court issued an order to show cause why Miller should not be allowed

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[15]Earlier, on December 12, 1973, and before her abortion, Miller had requested assistance at the local agency because she could not pay her December rent. That request was denied on the ground that she had allegedly left her employment, even though she was still employed. (A.89).

to intervene and why her motion for a preliminary injunction should not be granted. (A.87-88,102-103).[16] On February 19, 1974, a fair hearing was held. (A.91). On March 12, 1974 the State Commissioner rendered a decision favorable to Miller, reversing the local agency's denial of assistance. In his decision, he said:

> "Section 131(10) of the New York Social Services Law provides that a person who voluntarily terminates employment shall be ineligible for public assistance for 75 days unless otherwise required by Federal Regulation. In this case the agency determined that the appellant had provoked her own discharge and therefore was subject to such a *sanction.* The record, however, clearly establishes that during the period in which appellant was absent from work, she was under emotional strain and was in the initial stages of pregnancy and did not voluntarily provoke her discharge. The agency determination to deny appellant's application is reversed; . . . ." *Matter of Shirley Miller,* Decision After Fair Hearing (N.Y. State Dept. of Social Services, March 12, 1974) (Emphasis added)[17]

Thus the State Commissioner found that Shirley Miller had been erroneously subjected to the 75 day sanction.

3. Ulysses Westbrook

Ulysses Westbrook was employed as a New York State Corrections Officer at the Albion Correctional

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[16]Miller's motions were subsequently withdrawn.

[17]A copy of this Decision is annexed to this Brief as Appendix "A".

Facility in Albion, New York. His salary was $10,000 per year. (A.221-223,231).[18] On February 6, 1974, Westbrook was suspended from his work without pay after he was arrested on a criminal charge of assault. He later received a notice from his employer which stated that he would be dismissed from his employment. The notice alleged:

> "In Rochester, Monroe County, New York at approximately 5:50 P.M. of February 5, 1974 you struck Charles Square with a pistol and you shot him in the abdomen." (A.231).

Westbrook filed a grievance to protest his suspension without pay and dismissal. (A.232). After his suspension, Westbrook received no income; he was in debt to the attorney representing him in the criminal court proceeding; he had no money to pay his rent, buy food or to make support payments for his wife and two children. (A.223,232-233).

Westbrook applied for public assistance at the Monroe County Department of Social Services on February 22, 1974, and explained the circumstances that led to his destitution. (A.222,232,259). He was told he would have to wait 75 days from the date of his employment termination before he could receive assistance. He later received a written denial notice, dated February 26, 1974, which stated in part:

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[18]Westbrook was 38 years of age, and he lived alone. He was formerly employed by the Armour Meat Company in Rochester, New York from 1966 until it closed in 1971. Westbrook began his work as a corrections officer at the Attica prison in 1972 and he was subsequently transferred to Albion. (A.223).

"Your application has been denied because you were suspended from employment with N.Y.S. Dept. of Corrections. *Therefore a 75-Day Sanction is invoked.*
If you believe that this action should not be taken, you may request a state fair hearing . . . If you request a fair hearing, a notice will be sent to you of the time and place of the hearing. At the hearing you, your attorney or other representative will have an opportunity to present relevant written and oral evidence to demonstrate why the action should not be taken as well as an opportunity to question any persons who appear at the hearing and present evidence against you . . . ." (A.242-243) (Emphasis added).

On March 29 and April 1, 1974, Westbrook's counsel attempted without any success to persuade the lawyer for the Commissioner of the Monroe County Department of Social Services that the 75 day sanction should not have been imposed because Westbrook did not quit his employment for the purpose of obtaining public assistance. (A.220,221-224).[19]

On April 9, 1974, the Monroe County Commissioner's counsel was notified that Westbrook would seek relief from the District Court to enjoin imposition of the 75 day sanction. (A.220). Only after the District Court issued an order to show cause, (A.218-219), "[t]he Monroe County Department of Social Services reverse[d] its decision finding Westbrook ineligible under Social Services Law §131(11) and found him

[19]On April 8, 1974, Westbrook's counsel requested an expedited fair hearing, but was told by the State Commissioner's agents that one could not even be scheduled for Westbrook until April 22, 1974. (A.236).

eligible." (A.452). The District Court then denied Westbrook's motions. (A.4.)

4. Anthony Brownlee

Anthony Brownlee, a 32 year old resident of Yonkers, New York, worked for more than one year as a foreman in charge of receiving merchandise and maintaining inventories for a plastics company, until his employment was terminated on March 2, 1973. (A.256,297,300). His employment was terminated after he allegedly failed to make an accurate report of the amount of a necessary solvent remaining in a drum, which led to a shutdown at the plastics company on February 2, 1973. (A.300).

Brownlee subsequently applied for unemployment insurance benefits at the New York State Department of Labor, but his application was denied on March 26, 1973. (A.297,302). The Labor Department notice stated in part:

"DETERMINATION: You quit your job without good cause.
REASON: This Determination is based on the following: You provoked your discharge by failing to follow orders after previous warning which resulted in production shutdown." (A.302-303).

Brownlee appealed his disqualification from receiving unemployment benefits. (A.297). While searching for new work and awaiting his Department of Labor hearing, Brownlee ran out of money with which to pay for his food and rent, and he applied for public assistance. (A.256,297,304,306). Brownlee's application

for public assistance was denied. He received a denial notice dated April 18, 1973, which stated in part:

> "*There is a 75 day sanction from the day you quit your job* before you can apply for public assistance. As per letter from N.Y. State Dept. of Labor dated 3/26/73, 'you quit your job without good cause'.
>
> If you are not satisfied with this decision you have the right to ask for a Fair Hearing. . . ." (A.304) (Emphasis added).

A Fair Hearing was requested by Brownlee but was not held until May 8, 1973, and was not decided until May 22, 1973, more than 75 days after his employment termination. (A.256,305,306).

The State Commissioner affirmed the imposition of the 75 day sanction against Brownlee by the Westchester County Department of Social Services. The decision stated:

> ". . .[18NYCRR §385.7] provides that a person who voluntarily terminates employment or reduces his earning capacity for the purpose of qualifying for assistance shall be disqualified from receiving assistance for 75 days thereafter. . . . On the credible evidence the appellant was discharged from his employment under circumstances which constitute voluntary termination of employment within the meaning of the aforecited regulation. Accordingly, the determination of the agency is proper." (A.307).[20]

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[20]On April 25, 1973, a decision was made by an Unemployment Insurance Referee, who reached an opposite conclusion:

> "[T]he only method available to. . .[Brownlee] in checking on the amount of solvent was to sound the drum and estimate from such sound the amount of solvent in the drum. Such method is dependent to a great extent on personal judgment and is far from accurate. . . .Although there was negligence, it is held that although it is the employer's prerogative to discharge an employee if it wishes, claimant did not provoke his discharge under conditions requiring disqualification. DECISION: The initial determination is overruled." (A.301)

Brownlee's motion to intervene as a plaintiff was denied by the three-judge court as being unnecessary after the intervention of Joe Beverly, who also had been denied assistance after a "fair hearing" decision by the State Commissioner, and because the action was certified as a class action by the three-judge court. (A.574-575).

5. Ethel Reid

Ethel Reid, a resident of Yonkers, New York, was twenty-nine years of age and employed as a homemaker for a service agency until October 21, 1973. (A.257, 286). On that date Reid was told by her employer that she had been replaced because she had missed about one week of work when she went to Philadelphia on October 11, 1973 to be with her mother who was undergoing open heart surgery. (A.257,286-287).

Reid ran out of money with which to pay her rent and purchase food. (A.257,287). On October 31, 1973, she applied for public assistance at the Yonkers office of the Westchester County Department of Social Services. (A.287).

Reid was locked out of her apartment by her landlord when she could not pay her rent, and she again applied for public assistance. (A.287-288). She

received a denial notice dated November 23, 1974, which stated, in part:

> "Your application for public assistance has been denied for the following reasons:
>
> *You are sanctioned for 75 days from 10/11/73, the day you left your job.* However, you may re-apply on 12/24/73.
>
> If you are not satisifed with this decision you have the right to ask for a Fair Hearing. . . ." (A.291) (Emphasis added).

On February 8, 1974, about seventy days after her request for a "fair hearing", and after the expiration of the 75 day sanction period, the State Commissioner rendered a decision in which he relied upon the challenged regulation to affirm the imposition of the 75 day sanction. (A.257,288,292-295).[21]

Ethel Reid's motion to intervene was denied by the three-judge court in light of the intervention of the Beverlys and because the action was certified as a class action. (A.561-562,574-575).

C. Other members of the Plaintiff Class

1. Allen Phillips

Allen Phillips lived in Ossining, New York. He had a ninth grade education, was 39 years of age, and had been regularly employed "all [his] life" as an unskilled

[21] Eventually, Reid was rehired by her former employer, and on December 21, 1973, she again began receiving a salary of $48.40 per week. (A.289).

laborer until November, 1973, when he injured his hand and could not perform his work as a dishwasher. (A.262,310). Phillips received public assistance from about November, 1973 to January, 1974, when he found new work as a dishwasher at the Mayflower Hotel in Manhattan. (A.262,310).[22]

Phillips asked the Westchester County Department of Social Services to close his case because he had found work. (A.262,310). However, after about a week, Phillips was discharged by his employer because he reported late for work one day after missing his train. (A.262,310). Phillips again sought, but did not find, new employment. (A.311). He applied for public assistance on or about February 1, 1974. (A.311). He was subjected to the 75 day statutory sanction when he applied, and he much later received a written denial notice dated March 8, 1975, which stated:

> "Your application for public assistance has been denied for the following reasons:
>
> As it was explained to you at our last meeting of approximately February 21, 1974, you provoked your own discharge. *This means that you may not re-apply until 75 days from the date you were discharged.*
>
> If you are not satisfied with this decision you have the right to ask for a Fair Hearing. . . ." (A.312) (Emphasis added).

[22] While receiving public assistance Phillips complied with the requirements of Section 131(4) of the New York Social Services Law that he be available for work, report bi-monthly for work referrals, public service employment and actively seek employment. Phillips found the dishwasher job at the Mayflower Hotel on his own initiative. (A.310).

A hearing that had been requested on February 22, 1974 was scheduled for Phillips on March 12, 1974. However, Phillips was unable to attend his hearing because he had been arrested and imprisoned for an alleged shoplifting offense. (A.261, 311). His hearing was rescheduled and held on April 4, 1974. A Decision After Fair Hearing was rendered by the State Commissioner on April 29, 1975, in which he concluded that the 75 day sanction had been unlawfully imposed against Phillips. The decision stated, in part:

> "(4)The appellant was only late on one occasion when he missed his train. Section 385.7(a)(1) of the Regulations provides for the discontinuance or denial of assistance where there is a voluntary termination of employment for the purpose of qualifying for public assistance. The record establishes that the appellant did not provoke his discharge for the purpose of qualifying for public assistance. DECISION: The determination of the agency is not and cannot be affirmed." *Matter of Allen Phillips*, Fair Hearing Decision, (New York State Department of Social Services, April 29, 1974).[23]

While Phillips awaited his favorable decision, he could not afford to pay for the transportation he needed to seek new employment, and he was unable to pay for food and rent. (A.262,311).

2. Pat Scarfone

Pat Scarfone, 38 years of age, lived alone, was unemployed and was destitute when he applied for

[23]The decision is annexed to this brief as Appendix "B".

public assistance in Mount Vernon, New York on December 3, 1973. (A.260-261,313,319). He initially received a grant of Home Relief assistance. (A.313, 316,320). Scarfone obtained employment at the American Technical Machinery Corporation on December 10, 1973, for ninety dollars ($90.00) per week plus overtime pay. (A.320).[24]

Two days later, and before receiving his first paycheck, Scarfone was discharged from his employment because he did not operate a machine to the satisfaction of his employer. (A.260,313,320). Scarfone returned to the Department of Social Services for assistance. He received a notice dated December 12, 1973, which stated, in part:

> "Your application for public assistance has been denied for the following reasons:
>
> You were fired from your job due to the fact that you didn't follow instructions. Therefore you are not eligible for public assistance for 75 days. Since you were receiving aid up until 12/31/73, you are not eligible for PA until 3/14/74. If you are not satisified with this decision you have the right to ask for a fair hearing. . . ." (A.260,313,316).

A hearing was requested for Scarfone on December 13, 1973, but it was not decided by the State

[24]The minimum wage allowed by law in 1973 in New York was $1.85 per hour, or $74.00 for a 40 hour work week. In 1974, it was raised to $2.10 per hour, or $84.00 per week, and in 1976, it will be raised to $2.30 per hour, or $92.00 per *week*. *N.Y. Labor Law*, §652(d) (e) (f). (McKinney Supp. 1974). During the same time period, the basic welfare grant for all non-shelter needs of single persons like Scarfone was raised from $74.00 per *month* to its current level of $94.00 per *month*. *N.Y. Social Services Law*, §131-a (McKinney Supp. 1974).

Commissioner until February 20, 1974, 50 days after Scarfone was sanctioned. (A.260-261, 314,317).

In his decision after Scarfone's hearing, the State Commissioner held that the 75 day sanction had been erroneously imposed by his Westchester agents. The decision stated, in part:

> "[Scarfone] was put to work operating a machine and was discharged because of his lack of experience. . . .
>
> [T]he record establishes that the appellant was discharged because of his inability to perform the work to the satisfaction of the employer and did not voluntarily terminate the job. . .The determination of the agency is not and cannot be affirmed." (A.319-321).

While awaiting his fair hearing decision, Scarfone was unable to afford the cost of food and rent, and it became necessary for him to leave his apartment in Mount Vernon because he could not pay his rent. (A.261,314-315).[25]

3. Terry Yant

Terry Yant was 20 years old when he was released after eighteen months imprisonment at the Coxsackie

[25]Scarfone said, "I ran out of money and I was unable to pay for my rent or buy food. I had to resort to asking people if they could help me by giving me enough money for food, rent and other necessities." (A.314). Alms-seeking has been strictly regulated in New York since at least 1824, when begging by unlicensed individuals was made a crime. *See* N.Y.L. 1824,c.331 ("An Act to Provide for the Establishment of County Poor Houses"). See also, *N.Y.Penal Law*, §240.35 (1), which makes public begging an offense.

Correctional Facility on October 21, 1974. (A.587). On November 4, 1974, he was hired as a packager for Candy Lane industries, a position which required lifting and moving heavy cartons. (A.587).

Two days after being hired, Yant quit his job "because it put too much strain on a hernia condition for which [he] had major surgery in June 1973, and which continue[d] to limit [his] activities", and because of his "hope that [he] would soon be placed in a trade school with Hudson Valley Opportunities Industrialization Center." (A.588).

On November 22, 1974, Yant was denied public assistance by the Dutchess County Department of Social Services. His denial notice dated November 2, 1974, stated, in part:

> "Your application for Public Assistance Eff. 11/22/74 under the provisions of the Social Welfare Law, has been thoroughly investigated and the facts given careful consideration. Your application for this form of assistance has been denied for the following reasons:
>
> You voluntarily terminated your employment at Candy Lane." (A.588,590).

Yant again requested public assistance on December 4, 1974, and he received a second denial notice which stated as the reason for denial, "Quit job." (A.588, 591).[26]

[26]Yant and the six members of the plaintiff class discussed *infra* were summarily sanctioned for quitting their jobs *after* the State Commissioner allegedly "took steps to prevent misapplication" of the 75 day sanction by local agencies. (Jurisdictional Statement, p.21). See, "Guidelines Useful for Ascertaining Whether the Termination of Employment is for the Purpose of Qualifying for Public Assistance" (A.454-455).

Yant obtained public assistance for the time he had been disqualified pursuant to the post-judgment order of the District Court made after a hearing on plaintiffs' motion for contempt. (A.6,690). *See* Appendix "C".

4. Gladys Hart

Gladys Hart was 31 years old and had been employed as a domestic helper for two and one half years, until she had an argument with her employer and quit her job on October 14, 1974. (A.592). She was unable to pay her rent in November, 1974. She applied for public assistance at defendant's Poughkeepsie office on November 14, 1974. (A.593,594). The Dutchess County Department of Social Services denied her request, giving the following reason in its notice:

> "Due to quitting your job on 10/14/74, you are ineligible until December 17, 1974." (A.595).

Hart received assistance pursuant to the post-judgment order issued by the District Court on December 19, 1974, (A.6,690). *See* Appendix "C".

5. Lowell Swanson

Lowell Swanson lived in Stormville, New York, was 30 years old and was employed as a bookkeeper for a blacksmith shop in Beacon, New York. When he learned that his employer was engaging in what Swanson thought to be dishonest and illegal payroll practices, he refused to cooperate and, after an argument with his employer, he quit his job on November 6, 1974. (A.638).

Swanson sought but did not immediately find new employment. (A.640).[27] On November 21, 1974, he was without any funds, and he applied for public assistance at defendant's Poughkeepsie office. (A.638-640). Swanson received a denial notice after the District Court issued its November 11, 1974 decision and injunction, which stated, in part:

> "*You terminated your employment at L&A Blacksmith of your own choice and this makes you ineligible for assistance for 75 days.*
>
> We enclose a printed folder for the purpose of informing you of the provisions of the Social Welfare Law and of your rights thereunder."[28] (A.641) (Emphasis added).

Swanson received assistance pursuant to the post-judgment order of the District Court.

6. Barbara Mankes

Barbara Mankes was 29 years old and employed as a waitress at the Four Corners Diner in Beacon, New York, until her employment was terminated without explanation by her employer on November 26, 1974. (A.633).

Unemployed and without any funds, Mankes requested public assistance on November 28, 1974. (A.633). Her application was initially accepted, but

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[27] On December 3, 1974, Swanson found a temporary part-time job selling Christmas trees. (A.640).

[28] "Helping People to Help Themselves", an informational pamphlet of the New York Department of Social Services referred to in the notice, describes available benefits, work rules, eligibility conditions, and "fair hearing" rights. (A.340-372).

was then reconsidered and rejected. (A.633-634). She received a discontinuance letter which stated, in part:

> "NOTICE OF INTENT TO DISCONTINUE PUBLIC ASSISTANCE
>
> This is to advise you that this Department intends to DISCONTINUE your public assistance grant on December 31, 1974, for the following reasons:
>
> *You caused the termination of your job at the 4 Corners Diner. You are ineligible for public assistance for 75 days from the date of your termination (12/1/74).* You may re-apply for assistance at the end of 75 days." (A.636-637) (Emphasis added).

The threatened imposition of the 75 day sanction against Mankes was abandoned after the District Court entered its post-judgment order of December 19, 1974.

7. John Hepler, James Maine and Sherry Murphy

John Hepler, James Maine and Sherry Murphy, all residents of Tompkins County, New York, were denied public assistance due to enforcement of the statutory presumption after the decision of the three-judge court. (A.643,646,649,652,655). A volunteer worker at a storefront community service agency attempted without success to dissuade defendant's Tompkins County agents from sanctioning Mr. Hepler. (A.642,646).[29]

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[29] A letter from the local agency to the volunteer worker stated:

> "Tompkins County Department of Social Services has not received notification from the New York Department of Social Services in Albany regarding a change in regulation 385.7...since *the 75 day penalty* has been deemed unconstitutional by a three-judge panel....
>
> Mr. Diamente [employment specialist of the Department of Social Services] directed Ms. Rosenberger [Welfare employment representative] to continue applying 75 day and 30 day *penalties*, when applicable, until an administrative letter is sent to the Tompkins County Department from Albany to do otherwise...."
> (A.646) (Emphasis added).

After the three-judge court entered its final judgment, and after the post-judgment order of December 19, 1974, Hepler, Maine and Murphy were no longer subjected to the enforcement of the presumption and the 75 day sanction. See Appendix "C" to this brief.

PROCEEDINGS BELOW

Plaintiff Milne commenced a class action on December 19, 1973, pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3), in the United States District Court for the Southern District of New York. (A. 1). In the course of numerous intervention proceedings, Douglas Streeter, Robert Lee and Joe, Willie, Odell, and John Beverly were granted leave to intervene as plaintiffs. (A.200-201, 214-215). On February 20, 1974, the single district court (Wyatt, D.J.) requested the convening of a three-judge Court pursuant to 28 U.S.C. §§2281 and 2284 to hear and determine plaintiffs' claims for injunctive and declaratory relief against the enforcement of *New York Social Services Law*, §131(11) (McKinney Supp, 1974). (A.100-103).

Plaintiffs' motions for summary judgment and for a class action determination and defendants' motion for judgment on the pleadings or for summary judgment were heard by the three-judge court on May 10, 1974.

(A. 530-562). Plaintiffs sought summary judgment for declaratory and injunctive relief against the State Commissioner on the grounds that *New York Social Services Law*, §131(11) and 18 N.Y.C.R.R. §387.5 on their face and as applied to plaintiffs violate the Fourteenth Amendment to the United States Constitution. (A. 245).

Plaintiffs' motion for summary judgment was supported by numerous affidavits of persons who had been sanctioned under the challenged statute, and by governmental and other studies and reports which show that poor people and welfare recipients in general have the same work ethic as other persons, and that they generally do not leave their jobs for the specific purpose of qualifying for public assistance. (A. 327-438). Defendant State Commissioner did not offer into evidence or submit any studies or reports that refuted plaintiffs' evidence and he did not refer to any studies, reports or legislative proceedings which showed that people in the plaintiff class are likely to have terminated their employment for the purpose of qualifying for Home Relief assistance.

By decision dated November 11, 1974, the three-judge court (Oakes, C.J., Wyatt, D.J., Bonsal, D.J.) unanimously held that *New York Social Services Law*, §131(11) on its face violates the Due Process Clause because "there is an insufficient connection between the known fact, that is, application for public assistance within 75 days of an applicant's termination of employment, and the fact presumed by the statute, that is, that the applicant terminated his employment for the purpose of qualifying for public assistance." (A. 569). The court thus granted plaintiffs' motion for summary judgment and denied defendant's motions.

In reaching its conclusion, the three-judge court found that it is improbable that people quit their jobs for the specific purpose of qualifying for the low amount of Home Relief assistance. The court relied upon the stringent Work Rules that recipients of public assistance in New York must comply with, the numerous other reasons that a person is more likely to have for leaving his job, and the available empirical data substantiating that poor persons are unlikely to leave their jobs to qualify for public assistance. (A. 569-571, 573). While the court found it unnecessary to rule on plaintiffs' claim that they were denied a fair opportunity to rebut the statutory presumption, it noted that "[q]uite obviously, a determination of whether the statutory rebuttable presumption has been rebutted is totally meaningless when it occurs after the 75 day waiting period." (A. 577)

The three-judge court also found that the action is a proper class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure, (A. 574), certified the class (A. 579-580), and granted declaratory and injunctive relief in favor of the class. (A. 581-582).[30]

A contempt proceeding was held by the district court on December 19, 1974. (A. 661-698). This proceeding was brought on behalf of several persons who were denied assistance as a result of the continued enforcement of the statutory presumption after the ruling of the three-judge court. (A. 633-656). The single district judge granted additional relief to insure

[30]The three-judge court also denied two motions to intervene as unnecessary in view of the granting of prior motions to intervene and class action status. (A. 575)

compliance by the State Commissioner with the decision of the three-judge court. (A.7, 690).

To comply with the decision and judgment of the three-judge court, a Deputy Commissioner issued an Administrative Letter to the local commissioners requiring that the imposition of the sanctions be made only "on the basis of fact." (A. 631 632) The Administrative Letter explained that "This means that you [i.e., the caseworker] are to make a finding that a person who quits his job and applies for. . .HR within 75 days thereof has *in fact* quit his employment for the purpose of qualifying for such assistance. . . ." (A. 632) (Emphasis in original).

A second Administrative Letter stated, in part:

> "You are not to deny [Home Relief assistance] . . . unless you find from all available evidence as a *fact* that the applicant. . .has quit his or her employment for the purpose of qualifying for assistance. . . ." N.Y.State Department of Social Services Administrative Letter 74 ADM-186, Dec. 24, 1974. (Emphasis in original).[31]

On January 10, 1975, defendant filed a notice of appeal to this Court from the judgment of the three-judge court. (A. 701-704) On June 30, 1975, this Court noted probable jurisdiction of the appeal.

SUMMARY OF ARGUMENT

I.

New York Social Services Law, §131(11) provides that every person who voluntarily terminated employ-

[31] A copy of Administrative Letter 74 ADM-186 is annexed to this brief as Appendix "C".

ment within seventy-five days of application for public assistance is "deemed to have voluntarily terminated his employment. . .for the purpose of qualifying for such assistance. . .in the absence of evidence to the contrary supplied by such person." On the basis of this statutory presumption, defendant and his agents imposed sanctions of seventy-five day denials of Home Relief assistance against the plaintiffs.

This presumption violates the Due Process Clause because there is no "rational connection between the fact proved and the fact presumed." *Mobile, J. & K.C.R.R. v. Turnipseed,* 219 U.S. 35, 43 (1910). The presumption that employment termination was for the specific purpose of qualifying for public assistance is irrational because of the numerous ordinary on-the-job and personal reasons that a person is much more likely to have for leaving his job; because it is unlikely that a person would terminate voluntarily chosen employment in order to qualify for benefits which are conditioned upon the acceptance of any available employment; and because the benefits of $3.10 per day to meet all of a person's non-shelter needs are so low that it is unlikely that people would leave their jobs for the specific purpose of obtaining them.

There are no factual reports or hearings in the legislative record to substantiate any connection between the given and the presumed facts. Nor has defendant made any showing that people in the plaintiff class are likely to leave their jobs for the specific purpose of qualifying for public assistance. The available empirical evidence consistently substantiates the facts that poor people and welfare recipients have the same work ethic as other people and that they are

very unlikely to terminate their employment for the specific purpose of qualifying for public assistance.

Of the twenty one persons whose facts were before the court below, and who were sanctioned on the basis of the statutory presumption, all were needy and were left without funds to pay for food, rent and other necessaries. The record is clear that not one of these persons *in fact* terminated employment for the purpose of qualifying for public assistance.

Defendant argues that the presumption is both superfluous and indispensable. In the court below, defendant's Executive Deputy Commissioner inexplicably swore that the decisions to sanction plaintiffs were "based on evidence, not on presumption. . . ." (A. 453). Defendant now contends in this Court that there is danger of a "chaotic result," (Brief for Appellant, p.31), if decisions to impose the sanctions are based upon a finding "from all available evidence as a fact that [a person]. . .quit his employment for the purpose of qualifying for public assistance," (Appendix "C"). Defendant should not now be heard to complain in this Court of a judgment that only requires him to put into practice what he represented to the three-judge court as already being his policy.

II

The statutory presumption is rebuttable on its face. But as enforced by defendant, the presumption operated to deny plaintiffs due process of law because they were not afforded a "fair opportunity" to rebut it. *Adler v. Board of Education*, 342 U.S. 485, 495

(1952); *Western & A.R.R. v. Henderson*, 279 U.S. 639, 642 (1929); *Mobile, J. & K.C.R.R. v. Turnipseed*, 219 U.S. 35, 43 (1910).

At the time they sought assistance, plaintiffs were not afforded any opportunity to rebut the presumption and indeed were not even informed of its existence. Rather, plaintiffs were the victims of "reflexive" impositions of the statutory sanctions. *Owens v. Roberts*, 377 F. Supp. 45, 52 (M.D. Fla. 1974) (three-judge court).

The only "opportunity" to rebut the presumption was at a State "fair hearing." *N.Y. Social Services Law*, §166 (McKinney Supp. 1974); 18 N.Y.C.R.R. Part 358. The timing of the State fair hearing procedure, however, deprived plaintiffs of a fair opportunity to rebut the presumption. The State Commissioner has up to ninety days from the date of hearing request to render a fair hearing decision. 18 N.Y.C.R.R. §358.18. Persons sanctioned pursuant to the statutory presumption thus had no opportunity to rebut it prior to the imposition of the sanction and generally during the entire seventy-five day sanction period.

A fair opportunity to rebut the presumption requires that defendant hold and determine fair hearings prior to imposition of sanctions. When the severe harm to the plaintiffs and the risk that sanctions will be erroneously imposed on the basis of a presumed subjective purpose are balanced against any administrative inconvenience, due process requires that fair hearings be held and determined prior to the imposition of the sanction. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

Because defendant failed to afford plaintiffs a hearing and determination prior to the imposition of the sanctions and generally during the entire seventy-five day sanction period, the statutory rebuttable presumption operated as a conclusive presumption. Where important interests are at stake, the State may not conclusively presume facts that are "not necessarily nor universally true in fact," but must provide a party with a meaningful opportunity to show the actual facts. *Vlandis v. Kline*, 412 U.S. 441,452 (1973). *Accord, Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *United States Department of Agriculture v. Murry*, 413 U.S. 528 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972).

III

The New York State Department of Social Services purports to make a careful investigation, evaluation and determination of the actual facts concerning each applicant's eligibility for public assistance. 18 N.Y.C.R.R. Parts 351 and 352. Seventy-five day sanctions were imposed against the plaintiffs, however, not on the basis of actual facts, but on the basis of the assumption that they terminated employment for the specific purpose of qualifying for public assistance. The denial of assistance to needy persons on the basis of this presumption is arbitrary and irrational, in violation of the Equal Protection Clause. *Owens v. Roberts*, 377 F. Supp. 45, 51 (M.D. Fla. 1974) (three-judge court).

Where a governmental program generally makes case by case fact findings to support its determinations, it

cannot, consistent with the Equal Protection Clause, arbitrarily and irrationally single out one class of persons and deny them a fair opportunity to show the actual facts. *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972). Indeed, the State spites its own purposes in carrying out its public assistance programs when it denies assistance to needy persons who did not in fact leave their jobs in order to qualify for assistance. *Goldberg v. Kelly*, 397 U.S. 254, 264-265 (1970). The State's "mere objective" of eliminating a timely and meaningful fact finding procedure is "the very kind of arbitrary legislative choice" forbidden by the Equal Protection Clause. *Reed v. Reed*, 404 U.S. 71, 76 (1971).

That there is no legitimate state interest to support the use of the presumption is made clear by the inconsistent positions taken in the Brief for Appellant. At one point, the State Commissioner argues that the presumption is necessary because otherwise "it would be virtually impossible" for the agency to determine why a person left his job. Brief for Appellant, p. 30. On the other hand defendant concedes that if the district court judgment is affirmed, he will make case by case determinations of the purpose of job termination. Brief for Appellant, p. 47. (A. 632). Finally, defendant conceded in the court below that "the actual practical effect to the State is unknown at this time, the effect of the presumption as opposed to findings of fact." (A. 690).

It was thus irrational for the State to impose sanctions against persons who terminated their employ-

ment based on the assumption that they terminated their employment for the purpose of qualifying for assistance.

IV

All of the members of the plaintiff class who participated in the proceedings below were applicants for Home Relief assistance. *N.Y.Social Services Law*, §158 (McKinney Supp. 1974). Defendant represented to the court below that "there are very few, if any, persons receiving A.F.D.C. who are directly affected" by the contested statute. (A. 693). (*Accord*, A.691). Any person in the AFDC category affected by the enforcement of the contested statute would have a substantial claim that the state statutory provision conflicts with the Social Security Act. *E.g., Lewis v. Martin*, 397 U.S. 552 (1970); *King v. Smith*, 392 U.S. 309 (1968). This claim was not raised by the plaintiffs in the court below. Under these circumstances, plaintiffs agree with defendant that the class should be modified to exclude persons in the AFDC category.

ARGUMENT

I

THE PRESUMPTION THAT PLAINTIFFS TERMINATED THEIR EMPLOYMENT FOR THE PURPOSE OF QUALIFYING FOR PUBLIC ASSISTANCE VIOLATES THE DUE PROCESS CLAUSE BECAUSE THERE IS NO RATIONAL CONNECTION BETWEEN THE GIVEN FACTS AND THE FACT PRESUMED BY THE STATUTE.

The plaintiffs are individuals who requested public assistance in order to meet their needs for food, shelter and other necessities. They were disqualified from receiving any Home Relief assistance by the defendant State Commissioner and his agents due to the enforcement of the presumption in the second sentence of Section 131(11) of the New York Social Services Law and its regulatory counterpart, 18 N.Y.C.R.R. §385.7(b).

The first sentence of Section 131(11) disqualifies for two and one-half months (75 days) any person who voluntarily terminates his employment "*for the purpose of qualifying for home relief. . .*" *N.Y.Social Services Law*, §131(11) (McKinney Supp. 1974) (emphasis added). The validity of this provision is not in issue. *Milne v. Berman*, 384 F. Supp. 206, 208, 212 (S.D.N.Y. 1974) (three-judge court).

The second sentence of Section 131(11) contains the only provision that is in issue. It provides that "any person who applies for home relief. . .within seventy-five days after voluntarily terminating his employment *. . .shall, . . .be deemed to have voluntarily terminated*

*his employment. . .for the purpose of qualifying for such assistance, . . .*in the absence of evidence to the contrary supplied by such person." (Emphasis added).[32]

Thus, as initially described by defendant, "the statute creates a rebuttable presumption that if there is a voluntary termination of employment and an application for public assistance within seventy-five days, *the* purpose of *that* termination was to receive public assistance." Brief for Appellant, p. 5. (Emphasis added). *Accord, e.g.*, Jurisdictional Statement, p. 6; A. 457, 462, 617, 632). Defendant, however, equivocates in describing the presumption at other places in his brief. For example, at times, defendant refers to a person who "intended to apply for assistance when he quit his job," Brief for Appellant, p. 29, and to a person who "had that . . . source of income in mind [when he quit]." *Id.* at p. 30. *Contra, e.g., id.* at p. 5; Jurisdictional Statement, p. 6. But a person who terminated employ-

[32]The same presumption is contained in a regulation of the New York State Department of Social Services promulgated by the State Commissioner. 18 N.Y.C.R.R. §385.7(b). An explanation of the presumption to local caseworkers, relied upon by defendant at pages 45 and 46 of his Brief, explains that "this regulation [18 N.Y.C.R.R. §385.7] is based on the assumption [of Section 131(11)] that. . .applicants. . .have quit their jobs *specifically for the purpose of qualifying for. . .assistance.*" New York City Human Resources Administration, Income Maintenance Directive No. 14, January 27, 1972. (A. 457). (Emphasis added). See *Gaddis v. Wyman*, 304 F. Supp. 717, 721 (S.D.N.Y. 1969) (three-judge court), *aff'd sub nom Wyman v. Bowens*, 397 U.S. 49 (1970) (travel presumed to be for sole purpose of qualifying for welfare benefits). *See also*, 18 N.Y.C.R.R. §370.4(h) (transfer of property presumed to be for the purpose of qualifying for assistance).

ment for an everyday ordinary purpose who knew of or had "in mind" the existence of the State's public assistance program, or even a person who intended to seek public assistance if he later finds himself with no other means of support, did not terminate employment "specifically for the purpose of qualifying for. . . . assistance." (A. 457). Elsewhere in his brief, defendant again reverts to the statutory language, citing administrative guidelines that properly describe the specific disqualifying purpose, "giving examples of reasons for terminating employment which, if proven, would demonstrate a purpose other than qualifying for assistance." Brief for Appellant, p. 46-7.

When the State Commissioner's local agents determined that plaintiffs voluntarily left their employment, they presumed that plaintiffs had done so for the purpose of qualifying for Home Relief assistance, and the seventy-five day sanctions were summarily imposed. In cases where hearings were subsequently held, the State Commissioner relied upon the statutory presumption to uphold the locally imposed sanctions. For example, in erroneously concluding that plaintiff Joe Beverly terminated his employment "for the purpose of qualifying for home relief," the State Commissioner expressly relied upon the presumption and upheld the sanction, even though "clearly [Beverly] attempted to show that he terminated his employment for another reason. . . ." (A. 462). In addition, the sanctions imposed against class members Reid and Brownlee were upheld by the State Commissioner on the basis of the statutory presumption, even though it is clear from the record that they also did not leave their jobs for the purpose of qualifying for Home Relief assistance. (A. 294-295; 306-307). There is thus no basis in the record

for defendant's contention that rebutting the presumption is "an easy matter." Brief for Appellant, p. 25.[33]

Plaintiffs contend that the three-judge court properly held that the statutory presumption violates the Due Process Clause because there is no rational connection between the given fact, voluntary employment termination within the two and one-half months preceding a person's application for public assistance, and the fact presumed by statute, that the person terminated his employment for the purpose of qualifying for home relief. *Milne v. Berman*, 384 F. Supp. 206, 210 (S.D.N.Y. 1974). The three-judge court unanimously found that the presumed fact does not rationally follow from the given fact because of the high probability that plaintiffs terminated their employment for ordinary purposes and not for the purpose of qualifying for Home Relief assistance, *Id.* at 210-211; because Home Relief assistance is not provided unless a person initially and continually complies with the stringent New York "Work Rules," *Id.* at 210, n. 3; because Home Relief allowances are so low it is unlikely that persons would leave their employment for the purpose of qualifying for them, *Id.* at 210; and because the available evidence

[33]Plaintiffs were faced with the burden of proving a negative in order to rebut the presumption. Such a task "is always a difficult burden to meet," even for those with legal training. *Laskey Bros. of W. Va. v. Warner Bros. Pictures*, 224 F. 2d 824, 827 (2d Cir. 1955), *cert. denied* 350 U.S. 932 (1956). *Accord, Silver Chrysler Plymouth, Inc. v. Chrysler Mot. Corp.*, 518 F. 2d 751, 754 (2d Cir. 1975). *See generally, Speiser v. Randall*, 357 U.S. 513, 520-521 (1958) ("the procedures by which the facts of the case are determined assume an importance fully as great as the substantive rule of law to be applied").

In addition, defendant concedes that the presumption was "improperly applied." Brief for Appellant, p.12. For these persons, rebuttal of the presumption was no "easy matter."

shows that poor people and welfare recipients have the same work ethic as other people and do not terminate their jobs for the specific purpose of qualifying for public assistance.

In reaching its decision, the three-judge court applied the standard for determining the constitutionality of statutory rebuttable presumptions established by this Court in *Mobile, J. &K.C.R.R. v. Turnipseed*, 219 U.S. 35 (1910). In *Mobile*, this Court held that the Due Process Clause requires a "rational connection between the fact proved and the fact presumed. . .[T]he inferrence of one from the other shall not be so unreasonable as to be a purely arbitrary mandate." *Mobile, J. &K.C.R.R. v. Turnipseed*, 219 U.S. 35, 43 (1910).[34]

[34]The *Mobile* rational connection standard has deep roots in early decisions of this Court. In civil cases decided long before *Mobile* this Court held that for a presumption of fact to be fair, "the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. . . .The only presumptions of fact which the law recognizes are immediate inferences from facts proved." *Manning v. John Hancock Mutual Life Ins. Co.*, 100 U.S. 693, 698 (1879).

A presumption must not "give a new character to that which is seen to be defective." *French v. Edwards*, 80 U.S. (13 Wall.) 506, 514 (1872). A presumed fact is one which "most usually accompanies" the proven fact. *Home Insurance Company v. Weide*, 78 U.S. (11 Wall.) 438, 440 (1871).

A presumption must be "compatible with the conduct of those to whom it may be sought to apply." *Fresh v. Gilson*, 41 U.S. (16 Pet.) 327, 331 (1842). A presumed fact is "the natural result or necessary accompaniment" of the proven facts. *Bank of United States v. Dandridge*, 25 U.S. (12 Wheat.) 64, 69 (1827).

Presumptions "are founded upon the consideration, that the facts are such as could not, according to the ordinary course of

In *Atlantic Coast Line R.R. v. Ford*, 287 U.S. 502 (1933), the Court distinguished the presumption of negligence upheld in *Mobile* from the one found to lack a rational connection in *Western & A.R.R. v. Henderson*, 270 U.S. 639, 642 (1929). The presumption of the railroad's negligence in *Western* arose merely from proof of a grade crossing *collision* with an automobile, while the *Mobile* presumption arose from proof of a *derailment. Atlantic Coast Line R.R. v. Ford, supra* at 508.[35]

In *Tot v. United States*, 319 U.S. 463, 467 (1943) this Court unanimously held that the *Mobile* rational connection standard is the "controlling" test to

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human affairs, occur unless [the presumed fact also exists] . . . ." *Ricard v. Williams*, 20 U.S. (7 Wheat.) 59, 109 (1822).

The reasoning of these cases determining the fairness of judicially created presumptions is also applicable to the analysis of statutory presumptions. *See Barnes v. United States*, 412 U.S. 837, 845 n. 8 (1973).

[35]The Court said: "[I]t was fundamentally arbitrary, in that the mere fact of collision between a railway train and a vehicle at a crossing created a presumption that the accident was caused by the negligence of the company. The mere fact of such collision [in *Western*], we said, 'furnishes no basis for any inference as to whether the accident was caused by the railway company or of the traveller on the highway or of both or without the fault of anyone. Reasoning does not lead from the occurrence back to its cause.'" *Atlantic Coast Line R.R. v. Ford, supra* at 508. *Cf., Mobile, J. & K.C.R.R. v. Turnipseed*, 219 U.S. 35, 44 (1910) ("It is not an unreasonable inference that a derailment. . .is due to some negligence. . . .")

determine the validity of a statutory rebuttable presumption.[36] The Court in *Tot* concluded:

> "Under our decisions, a statutory presumtpion cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. . . . [W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts." *Tot v. United States* 319 U.S. 463, 467-468 (1943).

The *Mobile-Tot* rational connection standard has been applied consistently in the subsequent civil and criminal cases in which this Court has determined the

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[36]Before *Tot* was decided, this Court repeatedly invoked and applied the rational connection standard of *Mobile*, but with some variations in emphasis. *See, e.g., Morrison v. California*, 291 U.S. 82, 90 (1934) ("What is proved must be so related to what is inferred in the case of a true presumption as to be at least a warning signal according to the teachings of experience"); *Atlantic Coast Line R.R. v. Ford*, 287 U.S. 502, 508 (1933); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 19 (1931) (a "manifest connection"); *Western & A. R.R. v. Henderson*, 279 U.S. 639, 642 (1929); *Manley v. Georgia*, 279 U.S. 1, 6 (1929); *Yee Hem v. United States*, 268 U.S. 178, 183 (1925); *Hawes v. State of Georgia*, 258 U.S. 1, 4 (1922) ("Undoubtedly there must be a relation between the two facts. . . .[t]hat is, if one may evidence the other, there must be connection between them, a requirement that reasoning insists on. . . ."); *Greer v. United States*, 245 U.S. 559, 561 (1918) ("common experience shows the [presumed] fact to be so generally true that courts may notice its truth"); *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86 (1916); *Bailey v. Alabama* 219 U.S. 219, 238-239 (1911).

constitutionality of rebuttable presumptions. *Barnes v. United States*, 412 U.S. 837 (1973); *Turner v. United States*, 396 U.S. 398 (1970); *Leary v. United States*, 395 U.S. 6 (1969); *United States v. Romano*, 382 U.S. 136 (1965); *United States v. Gainey*, 380 U.S. 63 (1965); *Adler v. Board of Education*, 342 U.S. 485, 494 (1952). *See also, New York Times Co. v. Sullivan*, 376 U.S. 254, 284 (1964); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 215-220 (1963) (Stewart and White, J.J., dissenting); *Speiser v. Randall*, 357 U.S. 513, 537 (1958). In both *Leary* and *Romano*, the Court emphasized that the rational connection test employed in *Tot* was the same standard originally established in *Mobile*, "a civil case." *Leary v. United States, supra* at 33; *United States v. Romano, supra* at 139. The Court has not found it necessary to decide whether a standard stricter than the *Mobile* rational connection test is required in criminal cases. *Barnes v. United States, supra* at 843, 846; *Turner v. United States, supra* at 416; *Leary v. United States, supra* at 36 n. 64. *Accord, Mullaney v. Wilbur*, 95 S. Ct. 1881, 1891 n. 31 (1975); *United States v. Black*, 512 F. 2d 864, 869 9th Cir. 1975). It is thus clear that the constitutionality of the presumption in the case at bar is measured by the *Mobile-Tot* rational connection standard.

There is no rational connection unless "the presumed fact is more likely than not to flow from the proven fact on which it is made to depend." *Leary v. United States*, 395 U.S. 6, 36 (1969). *Accord, Barnes v. United States*, 412 U.S. 837, 842-3 (1973); *Turner v. United States*, 396 U.S. 398, 405 (1970). *See Greer v. United States*, 245 U.S. 559, 561 (1918) (A presumption must

be "generally true"); *Home Insurance Co. v. Weide*, 78 U.S. (11 Wall.) 438, 440 (1871) (The presumed fact "most usually accompanies" the proven fact).[37]

To determine whether a rational connection exists, this Court has relied upon "the generality of experience", *Adler v. Board of Education*, 342 U.S. 485, 493 (1952),[38] "common sense", *Turner v. United States*, 396 U.S. 398, 417 (1970),[39] "the circumstances of life as we know them", *Tot v. United States*, 319 U.S. 463, 468 (1943),[40] "the available, pertinent data," and "the available evidence". *Leary v. United States*, 395 U.S. 6, 38, 46 (1969).[41]

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[37]The "more likely than not" requirement for rational presumptions coincides with the rule that a "finding of fact" in civil cases is a determination "that its existence is more probable than its non-existence." Model Code of Evidence, Rule 1(5) (1942). Unless a presumed fact "more likely than not" exists, a "finding" of the fact presumed is irrational and arbitrary. *Mobile, J. & K. C. R.R. v. Turnipseed*, 219 U.S. 35, 43-44 (1910).

[38]*Accord, Barnes v. United States*, 412 U.S. 837, 844, 845 (1973) ("accumulated common experience" and "common knowledge"); *Tot v. United States*, 319 U.S. 463, 468, 471 (1943) ("common experience"); *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86 (1916) ("a relation in experience to general facts").

[39]*Accord, Barnes v. United States, supra* at 845 ("common sense and experience"); *Leary v. United States, supra* at 46 (common sense).

[40]*Accord, Barnes v. United States, supra* at 844-845; *Ricard v. Williams*, 20 U.S. (7 Wheat.) 59, 109 (1822) ("the ordinary course of human affairs").

[41]*Accord, Turner v. United States, supra*, 409-418; *United States v. Gainey*, 380 U.S. 63, 67 (1965). "But the test in the end is 'experience' – reality." *United States v. Adams*, 293 F. Supp. 776, 783 (S.D.N.Y 1968), cited in *Leary v. United States, supra* at 53 n. 116.

In the case at bar, the "given" facts are that an individual voluntarily terminated employment, and that within the following two and one-half months he or she applied for home relief assistance. *N.Y. Social Services Law*, §131(11) (McKinney Supp. 1974). From these facts, and nothing more, the statute presumes that the individual terminated his employment "for the purpose of qualifying for such assistance." *Id.*[42]

Thus, under the rational connection standard, the question is whether the "generality of experience", "common sense", "the circumstances of life as we know them", or the "available, pertinent data" show that it is likely that people in the plaintiff class

[42]This is a statutory "presumption of welfare abuse", *Gaddis v. Wyman*, 304 F. Supp. 713, 716 (S.D.N.Y. 1969). *See also* 18 N.Y.C.R.R. §370.4(h).

It is significant that two unanimous three-judge panels have found no factual basis to sustain similar presumptions of "bad motive" on the part of public assistance applicants. *Milne v. Berman*, 384 F. Supp. 206 at 212 (S.D.N.Y. 1974); *Owens v. Roberts*, 377 F. Supp 45, 53 (M.D. Fla. 1974) (prior transfer of property may not be presumed to be for the "fraudulent" or "malevolent" purpose of qualifying for assistance). *See also, Garcia v. Silverman*, 393 F. Supp. 590, 593 (E.D. Wis. 1975); *State ex. rel. Arteaga v. Silverman*, 56 Wisc. 2d 110, 201 N.W. 2d 538, 542 (1972). In addition, the State Commissioner "cited no case which would support the presumption. . . ." *Milne v. Berman, supra* at 210 (A. 573).

Thus the "accumulated common experience" embodied in the relevant case law, *Barnes v. United States, supra* at 844-845, is itself strong evidence that there is no factual basis to support presumptions that welfare applicants engage in wrongful behavior for the purpose of qualifying for assistance. *Cf. United States v. Romano*, 382 U.S. 136, 141 (1965).

terminated their employment not for personal, family, health, on-the-job problems or other reasons, but for the specific purpose of qualifying for Home Relief assistance.

Ordinary experience teaches that the great majority of people terminate their employment for many commonly known reasons, and that they do not terminate their employment for the purpose of qualifying for public assistance.[43] As the three-judge court said:

> "Any number of reasons for terminating employment exist - desire for advancement, problems of health, family problems, transportation problems, personality conflicts, working conditions, and perhaps simply basic discontent with a job, to mention a few." *Milne v. Berman*, 384 F. Supp. 206, 210, 211 (A. 570).[44]

[43]"One of the most valuable rights of man is to work where he pleases, and to quit one employment and go to another. . ." *Peonage Cases*, 123 F. 671 M.D. Ala. 1903. "[I]n general, the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers." *Pollock v. Williams*, 332 U.S. 4, 17-18 (1944).

[44]The district court's examples of common reasons why people leave their employment coincides with the general experience of employers. According to a recent survey of personnel executives, consisting of a cross-section of both large and small companies, the causes of non-management employee turnover are "personal problems (family, transportation, poor health, etc.), . . .followed in descending order by dissatisfaction with (1) pay, (2) job opportunities, (3) supervision and (4) working conditions." Bureau of National Affairs, *Turnover and Job Satisfaction*, Survey No. 91, July, 1970, Plaintiffs' Exhibit "G". (A. 410, 420, 421).

See F. Fournies, *The Real Reasons People Quit*, American Management Society Report, October, 1969; C. Williams, *Why*

Other reasons include the hope of finding a more desirable job, a lack of skills, training or supervision for a position, discriminatory employment practices, sub-standard pay, ethical considerations, and failure to satisfy psychological needs. *See* M. Argyle, *The Social Psychology of Work*, 225-6, 245 (Pelican, 1974); Report to the Secretary of HEW, *Work In America*, 3-10 (MIT Press, 1973) (A. 327-336).[45] Any one of these ordinary reasons is far more likely to be the purpose for terminating one's employment than the purpose presumed by the statute.

For example, it is common knowledge that individuals frequently exercise a voluntary choice to resign from employment they consider to be injurious to their physical or mental health. A recent study of New York City Home Relief Applications found that 23% of the applicants had left their prior employment due to

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Do They Quit?, 30 Administrative Management No. 10, (1969); C. Williams, *Why Workers Say 'I Quit'*, Supervisory Management, July 1968; K. Kahl, *New Light on Employee Turnover*, Supervisory Management, (April, 1969). None of these business management publications even suggests that persons actually quit jobs for the purpose of qualifying for public assistance.

[45]*See also,* Porter, et al., *Organizational Commitment, Job Satisfaction and Turnover Among Psychiatric Technicians*, 59 Journal of Applied Psychology 603-9 (Oct. 1974); Porter, *et ano., Organizational, Work and Personal Factors in Employee Turnover and Absenteeism*, 80 Psychological Bulletin 151-176 (Aug. 1973); J. Ledvinkin, *Race of Employment Interviewer and Reasons Given By Black Job Seekers For Leaving Their Jobs*, 58 Journal of Applied Psychology 362-4 (1973); Dunette, *et al., Why Do They Leave*, 50 Personnel (1973); F. Wickert, *Turnover and Employees' Feelings of Ego Involvement in the Day to Day Operation of A Company*, 4 Personnel Psychology 185-197 (1951).

illness. New York City Human Resources Administration, *Welfare Case Turnover in 1972* 62 (Preliminary Report Dec. 1973) (A. 570). *Accord*, E. Durbin, *Welfare Income and Employment*, in 1 *Labor Economics and Urban Studies* 111 (Praeger, 1969). And, in a study prepared for the United States Department of Labor, Manpower Administration, it was found that "poor health is by far the most important reason" why needy persons left their jobs. M. Ostrow and A. Dutka, *Work and Welfare in New York City* 57 (Johns Hopkins University Press 1975).[46]

Health problems, on-the-job problems, family and personal problems are far more likely reasons for job termination than a motive to qualify for assistance. As a matter of common sense and common experience, the fact that a person becomes needy and requests public assistance within two and one-half months after terminating his employment does not justify an inference that he or she terminated employment for the purpose of qualifying for public assistance. *See Garcia v. Silverman*, 393 F. Supp. 590, 593 (E.D. Wis. 1975).

Moreover, even if a person improvidently or irrationally terminated his employment and later finds himself without new work, family, friends or other

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[46]"Verification of illness is specifically referred to by defendant as *evidence which would rebut the presumption.*" Jurisdictional Statement, p. 21. (Emphasis added). "Verified illness" is one of the "examples of reasons for quitting jobs for purposes other than qualifying for public assistance." *Guidelines Useful for Ascertaining Whether the Termination of Employment is for the Purpose of Qualifying for Public Assistance.* (A.454-455).

means of support, this does not justify an inference that he or she terminated employment for the purpose of qualifying for Home Relief assistance. The statute does not purport to disqualify persons who terminated their employment improvidently, but only whose who terminated employment for the specifically proscribed purpose.[47]

The three-judge court recognized that there are "numerous reasons why a person who terminates his employment subsequently becomes impoverished and has to resort to a request for public assistance – general economic conditions, a decline in jobs available in a particular industry, health, or failure to receive an anticipated new position." *Milne v. Berman*, 384 F. Supp. 206, 211 (S.D.N.Y. 1974) (A. 570). As stated by the President's Commission on Income Maintenance Programs:

> "Obviously, the state of the American economy and the consequent structure of opportunities at the local level can enhance or impede employability greatly.... In the absence of strong aggregate demand, *even well planned efforts to find jobs can be ineffective.* President's Commission on Income Maintenance Programs, *Report: Poverty Amid Plenty*, 26 (U.S.G.P.O. 1969) (Emphasis added).[48]

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[47]For example, plaintiff Milne might have been better off had he disregarded his union representative's recommendation to resign, since he was ultimately cleared of misconduct charges at an unemployment insurance hearing. (A. 291).

[48]National economic policy "promotes," but does not "assure" full employment. *District 65, Wholesale Union v. Nixon*, 341 F. Supp. 1193, 1198 (S.D.N.Y. 1972). Thus, it is "impossible to base other social policies on the presumption that

In addition, the Commission found that "the major program dealing with the temporarily unemployed, but employable person is Unemployment Insurance. However, it did not provide benefits for nearly two-thirds of total unemployment in 1968 because of gaps in coverage and expiration of benefits". President's Commission on Income Maintenance Programs, *supra* at 4. And, it has been recognized that

> "low-income workers are more than usually likely not to receive unemployment insurance: Some are in uncovered industries such as local government, domestic service, and agriculture, others are new entrants into the labor force or new residents in the state, and some will have quit their last jobs or have been discharged for cause." A. Rees & H. Watts, *An Overview of the Labor Supply Results, in* J. Pechman & P. Timpane, eds., *Work Incentives and Income Guarantees* 65 (Brookings, 1975).

Defendant and his agents have set forth in their own regulations a number of reasons for employment termination that are far more likely than the presumed reason. In 18 N.Y.C.R.R. §385.6, the following reasons for terminating employment are set forth:

> "(c). . . .(2) the salary or wages was less than the minimum required by law, the conditions of employment were otherwise contrary to law, or the wages or compensation or hours or condition of work. . .are substantially less favorable to the

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all able-bodied persons in need of income would [find new work]...." D. Moynihan, *The Politics of a Guaranteed Income* 94 (Vintage, 1973). *See Arteaga v. Silverman*, 56 Wis. 2d 110, 201 N.W. 2d 538 (1972); *Mooney v. Pickett*, 4 Cal. 3d 669, 483 P. 2d 1231, 94 Cal. Rptr. 279 (1971).

applicant. . . than those prevailing for similar work in locality;

(3) a strike, lock-out or other industrial controversy was in progress. . .;

(4) . . .such employment would either require the applicant. . .to join a company union or resign from or refrain from joining any bona fide labor organization;

(5) the job would have been hazardous to the applicant's . . . life or health, or there was an absence, if appropriate, of workmen's compensation;

(6) the place of employment was an unreasonable distance from the applicant's . . . home;

(7) transportation by public carrier or by private means between the applicant's . . . home and the place of employment was unavailable;

(8) child care plans were temporarily disrupted . . .;

(9) temporary and verified illness incapacitated the client. 18 N.Y.C.R.R. §385.6.[49]

In addition, defendant's New York City agency enumerates "[h]arassment by employee's supervisor," "discrimination because of race, sex, age or religion," "expectation of another job that did not materialize," hazardous work conditions, transportation problems, "verified illness forced resignation," and strikes, as "examples of reasons for terminating employment, which, if proven, would demonstrate a purpose other

[49]"Although [18 N.Y.C.R.R. §385.6] concerns refusal to accept employment, the examples contained therein are useful as guidelines in ascertaining whether the termination of employment was for the purpose of qualifying for public assistance." N.Y. State Department of Social Services, Administrative Letter 74 Inf.-19. (A. 454).

than qualifying for public assistance." Brief for Appellant, 47. These everyday ordinary reasons for employment termination, set forth by defendant himself, show the irrationality of the presumption.

The record shows that all of the persons whose facts were before the court below terminated their employment for ordinary reasons and that not one of these persons *in fact* terminated employment for the purpose of qualifying for Home Relief assistance.[50] Plaintiffs'

[50]For example, Roy Levee missed work when his wife was ill. (A. 38-39). Ethel Reid left town and her work to be with her mother when she underwent open-heart surgery. (A. 257, 286-287).

Pat Scarfone could not operate properly a machine he was assigned to use. (A. 320). Anthony Brownlee made a mistake in calculating the amount of necessary solvents remaining in barrels. (A. 301) Defendant's agents initially found that Scarfone and Brownlee constructively quit by provoking their discharges, thus bringing them within the scope of the presumption.

Lowell Swanson, a bookkeeper, quit after an argument with his employer arising from Swanson's refusal to engage in payroll accounting practices he considered dishonest. (A. 638).

Plaintiff Lee's employer objected to Lee's "excused and unexcused" absences after he was injured in an auto accident. (A. 71). Domestic workers Shirley Miller (A. 90), and Gladys Hart, (A. 592), had differences with their employers.

Plaintiffs Joe, Willie, John and Odell Beverly, four brothers ranging in age from 17 to 23, were evicted with their sister from their residence near the poultry farm in Yates County where they worked. (A. 150) Unable to find suitable replacement housing near their work, and without an auto, drivers' licenses or public transportation, they terminated their employment and looked for new work in the Ontario County communities where their mother, sisters and friends live. (A. 151-2). The State Commissioner "found" that Joe Beverly terminated employment for the purpose of qualifying for public assistance, (Brief for Appellant, p. 13). His decision, (A. 459-460), was based on the presumption, and is simply not supported by the record.

experience is consistent with empirical findings that "spatial isolation is a serious obstacle to employment in many rural areas [as with the Beverlys], while health problems afflict a substantial number of potential workers [as with plaintiffs Lee, Streeter, and class member Terry Yant]." B. Schiller, *Empirical Studies of Welfare Dependency: A Survey*, 8 Journal of Human Resources 19, 24 (Supp. 1973). "[T]he main sources of job dissatisfaction [for blue-collar workers] concerned work conditions, low wages, difficulty of the tasks, or long hours. . . . " M. Fried, *The World of the Urban Working Class* 164 (Harvard, 1973). These ordinary reasons are far more likely reasons for job termination than the purpose presumed by the statute.

Welfare recipients are a heterogeneous group. M. Ostow and A. Dutka, *Work and Welfare in New York City* p. X, XIV, 75 (Johns Hopkins University Press, 1975). It is an error to view the welfare population as a homogeneous group, since it is a changing group that is populated by a significant number of subgroups. *Id.* at XIV, 75. The record shows that plaintiffs had diverse backgrounds and work histories, were employed in a wide variety of jobs,[51] and left their employment and became needy for a wide variety of ordinary reasons. Nevertheless, they were all lumped together and they were all presumed to have terminated their employment for the purpose of qualifying for Home Relief assistance.

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[51]New York City "has the largest and most diversified labor market of any city in the country." M. Ostow and A. Dutka, *Work and Welfare in New York City* pp. 50-51 (Johns Hopkins University Press, 1975).

In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Court, in rejecting the contention that a durational residency requirement is justified to "discourage those indigents who would enter the state solely to obtain larger benefits," concluded that there is no basis to presume that people are likely to come to a state for this purpose. On the contrary, this Court recognized that "the *great majority* . . . come to the state for other purposes. . . ." *Id.* at 631. (Emphasis added). Similarly, "the great majority" of persons who terminate their jobs do so "for other purposes." As this Court has recognized:

> "[T]he theory of the Elizabethan poor laws no longer fits the facts.
>
> Whatever may have been the notion then prevailing, we do not think that it will now seriously be contended that because a person is without employment and without funds he constitutes a 'moral pestilence'. *Poverty and immorality are not synonymous.*" *Edwards v. California*, 314 U.S.1, 174, 177 (1941). (Emphasis added).[52]

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[52]Here, experience does not "teach that the evidence held to be inculpatory has at least a sinister significance." *Morrison v. California*, 291 U.S. 82, 91 (1934). *Cf. Bailey v. Alabama*, 219 U.S. 219, 236 (1911). Compare presumptions of adverse facts arising from "suspicious" or "sinister" given facts. *E.g., Barnes v. United States*, 412 U.S. 837 (1973) (possession of stolen goods); *Turner v. United States*, 396 U.S. 398 (1970) (possession of 275 envelopes of heroin); *United States v. Gainey*, 380 U.S. 63 (1965) (presence at illegal liquor still); *Adler v. Board of Regents*, 342 U.S. 485 (1952) (member of organization officially found to be subversive); *Mobile, J. & K.C.R.R. v. Turnipseed*, 219 U.S. 35 (1910) (negligence presumed from proof of injury caused by train derailment).

But see, City of New York v. Miln, 36 U.S. (11 Pet.) 102, 142-143 (1837).

The presumption that plaintiffs terminated their employment for the purpose of qualifying for Home Relief assistance is particularly irrational because compliance with all of New York's Work Rules is a prerequisite to both initial and continuing eligibility for Home Relief. See *N.Y. Social Services Law*, §131(4); 18 N.Y.C.R.R. §385.4.

The comprehensive New York Work Rules for recipients recently were summarized in *New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973):

> "[T]he Work Rules establish a presumption that certain recipients of public assistance are employable [N.Y. Social Services Law, §131(5)], and require those recipients to report every two weeks to pick up their assistance checks in person; to file every two weeks a certificate from the appropriate public employment office stating that no suitable employment opportunities are available; to report to the public employment office the result of a referral for employment; and not to fail willfully to report for suitable employment, when available. In addition to establishing a system of referral for employment in the private sector of the economy, the Work Rules permit the establishment of public works projects in New York's social service districts. Failure of 'employable' persons to participate in the operation of the Work Rules results in a loss of assistance." *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 408-409 (1973).

The Work Rules apply to all applicants, who must obtain certification from the New York State Department of Labor that no work is available *before* their eligibility for Home Relief may be established.[53] In addition, Home Relief recipients may be required to work, without compensation, on public work relief projects.[54] Section 164 of the New York Social Services Law provides:

> "[E]mployable persons receiving home relief shall be required to perform such work as shall be assigned to them by the social services official. . . . 4. Any person who refused to report for or to perform work . . . shall thereupon become ineligible for home relief. *N.Y. Social Services Law*, §164 (McKinney Supp. 1974). *See Ramsey v. Lavine*, 82 Misc.2d 322, 323 (N.Y. Sup. Ct. 1975).

As a matter of common sense, it is irrational to presume that persons would terminate their voluntarily

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[53]The Work Rules for both applicants and recipients are well publicized in the information pamphlets of the New York State Department of Social Services, which state:

WORK PROGRAMS

> *"No employable person is eligible for public assistance unless he has first registered at the State Employment Service . . ."* N.Y. State Dept. of Social Services, "Helping People to Help Themselves." (A. 352-353). (Emphasis added).

[54]As early as the seventeenth century, New York's welfare programs required able-bodied unemployed persons to work. N. Fensterstock, *History of New York Social Legislation* XII, n. 22 in 52A McKinney N.Y. Social Services Law (1966). *See* Piven & Cloward, *Regulating the Poor: The Functions of Public Welfare* 8, 22-25 (Vintage: 1972); Feagin, *Subordinating the Poor: Welfare and American Beliefs* 20-21 (1975); Trattner, *From Poor Law to Welfare State: A History of Social Welfare in America* 54 (Free Press: 1974). *See also*, N.Y. Laws 1824, c. 331 (V). (Solitary confinement with bread and water for any person deemed to have violated poor house work rules).

chosen present employment for the purpose of qualifying for Home Relief assistance, when as a condition for receiving such assistance a person must accept *any* job he or she is capable of performing. Thus "it is not reasonable to presume that currently employed persons would terminate their employment to attempt to avoid work." *Milne v. Berman*, 384 F. Supp. 206, 210 n. 3. (S.D.N.Y. 1974) (A. 577).

Other well recognized eligibility conditions also make it unlikely that persons would terminate their jobs for the purpose of qualifying for public assistance. As Mr. Justice Marshall recently stated:

> "Often welfare applicants must be stripped of their worldly goods before being admitted to the welfare rolls . . . [A person] may be required not only to exhaust his savings but also to convert many of his assets into cash before being able to fall back on public assistance. He may have to give up his home or cherished personal possessions in order to become eligible. . . . The level of subsistence provided by welfare is minimal, certainly less than one is apt to expect from steady employment." *Arnett v. Kennedy*, 416 U.S. 134, 221 (1974) (dissenting opinion).

This description of welfare eligibility rules and benefit levels is fully applicable to Home Relief assistance in New York. Home Relief is provided only to persons who have no resources, savings, cash, or other assets. *See* 18 N.Y.C.R.R. §§352.16, 352.22-28.[55]

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[55]A person may be required to liquidate or assign all his equity in his home, *N.Y. Social Services Law*, §§104, 360 and 18 N.Y.C.R.R. §352.27, and he may be required to assign his personal injury claims, *N.Y. Social Services Law*, §105. See *Snell v. Wyman*, 281 F. Supp. 853 (S.D.N.Y. 1968), *aff'd*, 393 U.S. 323 (1969). A person may be ineligible simply because he possesses an automobile. 18 N.Y.C.R.R. §§352.15(d), 352.28(b). *See Knowles v. Lavine*, 42 App. Div. 2d 742, 346 N.Y.S.2d 296 (2d Dept. 1973) *rev'd on other grounds*, 34 N.Y.2d 721, 356 N.Y.S.2d 864 (1974). Some items are exempt. *See generally*, 18 N.Y.C.R.R. §§352.16-.29.

In New York the amount of Home Relief assistance now available to individuals like plaintiffs is $94.00 per month, or about $3.10 per day for all needs except shelter. *N.Y. Social Services Law*, §131-a (McKinney Supp. 1974).[56] A recent Congressional survey found that the average *total* public assistance benefits in New York City for an individual with no other income amounts to about $2,112 per year.[57] As a matter of general experience, people aspire to standards of living above a bare subsistence level. Yet that, at best, is all that Home Relief assistance provides.[58]

[56]Shelter allowances are provided on an "as paid" basis, up to maxima established in each welfare district. 18 N.Y.C.R.R. §352.3(a). Total amounts paid to recipients thus vary from county to county, but individual Home Relief recipients have at most $94 per month for all their non-shelter needs, and even less if their actual shelter costs exceed local maxima.

[57]Staff of Subcomm. on Fiscal Policy, Joint Economic Committee, 93d Cong. 2d Sess., Paper No. 15, *Welfare in the 70's: A National Study of Benefits Available in 100 Local Areas* 192 (Comm. Print 1974). In contrast, the after-tax earnings of a person in New York City earning $2.00 per hour are about $3,399 per year; the median after tax income for all men is $5,972 per year; and the median after-tax income for all women is $4,098 per year. *Id.*

[58]In addition, New York has the most stringent repayment provisions in the nation. *"Any public assistance or care received . . . shall constitute an implied contract. . . .* In all claims . . . the public welfare official shall be deemed a preferred creditor," *N.Y. Social Services Law*, §104(1). (Emphasis added). See Graham, *Public Assistance, The Right to Receive, The*

Welfare administrators have frequently stated that New York's public assistance allowances do not provide sufficient funds for a decent standard of living. See *Rothstein v. Wyman,* 303 F. Supp. 339, 348-49 (S.D.N.Y. 1969), *vacated and remanded on other grounds,* 398 U.S. 275 (1970). The New York City Commissioner recently stated that

> "the basic welfare grant has 'fallen far behind the pace of the rising cost of living.' The state ordered grants [established under Section 131-a of the New York Social Services Law] are based on standards as of January, 1972, and since that time the consumer price index has risen 25.1% . . .
>
> Mr. Dumpson says inflation has forced welfare families to cut down on food, clothing and other expenses, as well as on their 'social mobility'—the ability to better themselves." New York Times, Feb. 10, 1975, p. 45, col. 4 (brackets added).[59]

In hearings before a Congressional committee, a former acting New York State Commissioner was asked whether he believed people would quit their jobs in order to qualify for public assistance. He testified, in part:

Obligation to Repay, 43 N.Y.U.L. Rev. 478 (1968); Baldus, *Welfare as a Loan, An Empirical Study of the Recovery of Public Assistance Payments in the United States,* 25 Stan. L. Rev.123 (1973). See also, *Snell v. Wyman,* 281 F. Supp. 853 (S.D.N.Y. 1968), *aff'd* 393 U.S. 323 (1969).

[59]"For most recipients welfare still means living 'low on the hog.' Welfare is the 'good life' only for those who have not lived it." J. Feagin, *Subordinating the Poor: Welfare and American Beliefs* 114 (1975). *See* L. Goodwin, *Middle Class Misperceptions of the High Life Aspirations and Strong Work Ethic Held by the Welfare Poor,* 43 American Journal of Ortho-psychiatry 554 (July 1973).

> "But I question, if that is the line of reasoning, that the public assistance payment levels themselves, or even the combination of services are so liberal as to encourage people to leave work and to go on public assistance rolls." Testimony of Mr. Barry Van Lare, Acting Commissioner of the New York State Department of Social Services, in *Hearings before Subcommittee on Fiscal Policy of the Joint Economic Committee, Problems in Administration of Public Welfare Programs,* 92d Cong., 2d Sess. Part 1, at 362 (1972).[60]

And a former New York City Commissioner testified that "the kind of life welfare is, you know, there is not much incentive to cheat to get on it." Testimony of Mitchell T. Ginsberg, Commissioner of the New York City Department of Social Services in *Hearings before Senate Finance Committee on H.R. 16311,* 91st Cong., 2d Sess. Part 3, 1327-1328 (1970).[61] (Emphasis added). In addition, welfare is a stigmatized benefit, and "recipients know this." D. Moynihan, *Politics of a Guaranteed Income* 18, 98 (1972). "Rightly or wrongly, many people consider welfare degrading and would decline public assistance even when eligible." *Arnett v.*

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[60]In addition, by providing public assistance to strikers, who by definition are dissatisfied with their working conditions, the State recognizes that people do not stop working in order to qualify for public assistance. "The state can hardly be viewed as encouraging strikes by allowing these [public assistance] payments; the prospect of receiving a fraction of normal wages, after the exhaustion of all savings and other assets, would hardly seem an incentive to strike." *Lascaris v. Wyman,* 31 N.Y.2d 386, 394 n. 4, 340 N.Y.S.2d 397, 402 (1972), quoting from Note, *Welfare Assistance to Strikers,* 67 Nw. U.L. Rev. 245, 260.

[61]The poor are no more likely to "drop out of the work force . . . to settle for this meager income . . . than are middle-class people." Goodwin, *Do the Poor Want to Work* 117 (Brookings 1972).

Kennedy, 416 U.S. 134, 221 (1974) (Marshall, J., dissenting).[62]

In addition, rigorous investigations, verifications, interviews, forms and recertifications make it unlikely that workers would leave their jobs for the purpose of attempting to qualify for public assistance. See 18 N.Y.C.R.R. Part 351.[63] The application process "make(s) every applicant believe that he [is] being viewed with suspicion, that, until the contrary could be established, the applicant [is] presumed to be a cheat or a parasite." G. Steiner, *The State of Welfare* 89 (Brookings, 1971). An official study of New York's welfare application process has reached the same conclusion. See *Report to the Moreland Commission on Welfare Findings of the Study of the Public Assistance Program and Operations of the State of New York* 78 (1962). The procedures for receiving assistance have been described as a "bureaucratic design in deterrance. One device is the intimidation of applicants, accomplished in part by hostile and mistrustful

[62]During 1968 in New York City, *approximately 150,000 families were eligible for wage subsidies* (according to the welfare department's own estimate), *but only about 15,000 families were claiming them.*" Piven & Cloward, *Regulating the Poor: The Functions of Public Welfare* 174 (Vintage: 1971). *See also, Relief Survey Says 480,000 Eligibles Seek No Aid Here*, New York Times, Nov. 23, 1973, p. 1, col. 4.

[63]These procedures are stringently complied with in New York. Piven and Cloward, *Regulating the Poor: The Functions of Public Welfare* 160 (Vintage: 1971).

treatment. . . ." F. Piven & R. Cloward, *Regulating the Poor: The Functions of Public Welfare* 152 (Vintage: 1971). *See Id.* at 160, 161 n. 20. (New York City Budget Bureau Recommendation to "build up and maintain the maximum legal backlog" of applications). *See also, Perez v. Lavine*, 378 F.Supp. 1390 (S.D. N.Y. 1974).[64]

In sum, New York's Home Relief program is based upon the well-established principle of "less eligibility" which ensures that it is much less desirable for a person to be a recipient of public assistance than to work as the "humblest independent laborer." N. Fensterstock, *History of New York Social Welfare Legislation*, p. X, 52A McKinney N.Y. Social Services Law (1966), citing Webb, *English Poor Law Policy* (1910). *See* J. Feagin, *Subordinating the Poor: Welfare and American Beliefs* 31, 71 (Spectrum, 1975); F. Piven & R. Cloward, *Regulating the Poor: The Functions of Public Welfare* 25, 36 (Vintage, 1971); W. Trattner, *From Poor Law to Welfare State: A History of Social Welfare in America* 49 (Free Press, 1974); G. Steiner, *The State of Welfare* 28 (Brookings, 1971). When the Work Rules and other eligibility conditions for Home Relief, the low level of benefits and the stigma of receiving public assistance are considered together with the multitude of ordinary, more likely reasons why persons terminate employment and become needy, it certainly cannot be said that the presumed motive is generally true as a matter of common experience and common sense.

This Court has looked to evidence embodied in legislative records as an aid in determining whether an

[64]*Cf.* N.Y. Times, Aug. 20, 1974 p. 39, col. 1 ("Crowding, Waiting Deject Welfare Families in Bronx"); N.Y. Times, Oct. 17, 1975, p.15, col. 4 ("Productivity Pressed To Cut Welfare Costs") (Home Relief waiting lines formed at midnight).

enactment of a presumption "accorded the evidence [of a proven fact] 'its natural probative force.'" *United States v. Romano*, 382 U.S. 136, 140 (1965), citing *United States v. Gainey*, 380 U.S. 63, 67, 71 (1965). *Accord, Leary v. United States,* 395 U.S. 6, 35 (1969). However, the legislative record contains no findings, factual reports, or hearings concerning the presumption in the case at bar.[65] It is "apparent that the legislative record does not supply an adequate basis upon which to judge the soundness . . . of the presumption." *Leary v. United States, supra* at 39.

The only possible basis to justify the presumption would be if the available data showed that members of the plaintiff class were persons who do not behave and think like ordinary men and women with respect to work and welfare. When there is a "paucity of direct evidence" as to the presumed fact, this Court has "found it desirable to survey data concerning" both the proved and presumed facts in deciding whether a fact may fairly be presumed to exist. *Leary v. United States,* 395 U.S. 6, 38-39 (1969; *Turner v. United States,* 391 U.S. 398, 409-418 (1970).

Since the presumption is contrary to common experience, and since there is no evidence in the record or legislative history to support it, the presumption is arbitrary unless it can be justified by empirical data

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[65]The sparse legislative history of Section 131(11) is set forth at 2 N.Y. Sess. Laws 1971, 2510-11, 2636-7. Defendant submitted no data to show that it is actually likely that members of the plaintiff class quit their work for the purpose of qualifying for Home Relief assistance. *Milne v. Berman,* 384 F. Supp. 206, 212 (S.D.N.Y. 1974). "The style of welfare legislation in New York [in 1971] . . . was one of shrill hysteria. . . ." B. Diamond, *Poverty Law*, 23 Syracuse L. Rev. 569, 589 (1971).

from other sources. However, far from providing a factual basis to support the statutory inference, the available empirical data overwhelmingly show that the presumption is totally irrational, and that it is based upon factually unsupported stereotypes of poor persons. *Cf. Frontiero v. Richardson,* 411 U.S. 677, 685 (1973). All of the available evidence shows that poor people and welfare recipients have the same work ethic as other people, and that they do not generally terminate their employment for the purpose of qualifying for public assistance.

It is well recognized that there are many negative false stereotypes about poor persons and welfare recipients in our society, and that these stereotypes are embodied in punitive welfare legislation.[66] As Mr. Justice Marshall recently stated:

> "Myths abound in this area. It is widely yet erroneously believed, for example, that recipients of public assistance have little desire to become self-supporting. See, e.g., L. Goodwin, Do the Poor Want to Work?, 5, 51-52, 112 (1972). Because the recipients of public assistance generally lack substantial political influence, state legislators may find it expedient to accede to pressures generated by misconceptions. [There is a] possibility that erroneous beliefs will lead state legislators to single

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[66]*See* B. Diamond, *The Children of Leviathon: Psychoanalytic Speculations Concerning Welfare Law and Punitive Sanctions,* 57 Calif. L. Rev. 357, 360 (1966). Simultaneously held compassionate and punitive attitudes toward the poor may have led legislators to promote benevolent welfare measures by coupling them with largely symbolic punitive measures. *See* D. Moynihan, *Politics of a Guaranteed Income* 16 n. 6, 32 n., 218-20 (Vintage, 1973).

out politically unpopular recipients of assistance for harsh treatment . . ." *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 432 (1973) (dissenting opinion).[67]

New York welfare officials have also recognized that myths about the work ethic of welfare recipients are not justified in the experience of their agencies. The former Administrator of New York City's welfare programs testified before Congress:

> Public officials have their own set of myths about the welfare population too, and they are deluded by these myths. Although the public work program [established under the New York Work Rules] is, in many ways, a repressive measure, *we have found from our experience with the program . . . that the people required to participate are willing to work.*"
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> Statement of Jule M. Sugarman in *Hearings Before the Subcommittee on Fiscal Policy of the Joint Economic Committee, on Problems in Administration of Public Welfare Programs* 220 92d Cong., 2d Sess. (1972). (Emphasis added).

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[67]Some authors contend that false myths about the morality of the welfare poor are exploited by political "scapegoat" tactics which are designed to reduce "economic tension" resulting from welfare expenditures. J. Feagin, Subordinating the Poor: Welfare and American Beliefs 121 (Spectrum, 1975).

One of the best known incidents involving political exploitation of false negative stereotypes of welfare recipients occurred in Newburgh, New York. R. Levy, *et al.*, *Social Welfare and the Individual* 5-10 (Foundation, 1971), quoting from E. May, *The Wasted Americans* (1964); D. Moynihan, *The Politics of a Guaranteed Income* 27 (1973); Feagin, *supra* at 74; F. Piven & R. Cloward, *Regulating the Poor: The Functions of Public Welfare* 169 (Vintage, 1971). *See New York State Board of Social Welfare v. City of Newburgh*, 28 Misc.2d 539, 220 N.Y. Supp. 2d 54 (N.Y. Sup. Ct. 1969).

In addition the State Commissioner has represented to this Court that he regards as "significant" a statement of Senator Russell Long that, according to HEW studies, "more adults in families receiving welfare would prefer to work rather than remain on welfare," Brief of Appellant in *New York State Department of Social Services v. Dublino*, 405 U.S. 413 (1973) p. 33.

The myth that welfare recipients do not want to work has been consistently recognized by leading authorities as being unfounded.[68] As stated in *Work in America*, Report of a Special Task Force to the Secretary of Health, Education and Welfare (MIT Press, 1974):

> "Underneath the resentment and the frustration, and giving rise to them, are a host of *unverified assumptions* about the character and composition of the welfare population; most poor people don't want to work . . . people on welfare live well and easy; most people on welfare want to be on welfare; etc.

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[68]*See, e.g.*, President's Commission on Income Maintenance: *Report, Poverty Amid Plenty, The American Paradox* 60 (1969); G. Steiner, *The State of Welfare* 20-27 (Brookings, 1971); L. Goodwin, *Do the Poor Want to Work* (Brookings, 1971); Report to the Secretary of Health, Education and Welfare, *Work in America* 176-177 (MIT, 1973) (A. 338); B. Schiller, *Empirical Studies of Welfare Dependency*, 8 Journal of Human Resources 19 (1973); J. Feagin, *Subordinating the Poor: Welfare and American Beliefs* 2 (Spectrum, 1973); F. Piven & R. Cloward, *Regulating the Poor: The Functions of Public Welfare* (Vintage, 1971) D. Moynihan, *The Politics of a Guaranteed Income* 218 (Vintage, 1973). *See also*, N.Y. Times, Oct. 6, 1974, p. 76, col. 1, ("Study Disputes Welfare Myth: Few Newcomers Reported Coming Here To Seek Aid"); N.Y. Times, Nov. 17, 1971, p. 73, col. 3 ("Westchester Study Disputes Usual Relief-Client Image").

Every one of these assumptions is demonstrably false as a generalization, and is true only in the occasional particular. The facts are that most poor people are not on welfare and the majority of poor people not only want to work but do work, year round and full time. . . ." *Id.* at 176. (A.338-9, 571). (Emphasis added).[69]

In recent years, a great amount of evidence has been accumulated concerning the work behavior of poor people and welfare recipients.[70] "[F]ederal agencies, especially the Manpower Administration of the U.S. Department of Labor, have funded a large number of research projects which bear directly on these issues [of poverty and dependency, marginal tax rates, motivation, work incentives, and general welfare reform]." Schiller, *Empirical Studies of Welfare Dependency: A Survey*, 8 Journal of Human Resources 19 (1973 Supp.). A summary of the findings of recent research published by the United States Department of Health, Education and Welfare concludes:

> "Increased sophistication of research on lower-income and deprived groups is correcting a long-held impression that the poor place no value on occupational and educational achievement. . . . [T]he poor . . . want relatively more improvement in their condition. They value the same material

[69]The Report concluded that "[t]he negative attitudes of most Americans about welfare thus constrain national leaders in their development of policy." *Id.*

[70]"[I]t is impossible not to be impressed by the extent to which [welfare] policy decisions are made and perpetuated on the basis of *beliefs* about facts rather than tested knowledge." D. Moynihan, *The Politics of a Guaranteed Income* 289 (Vintage, 1973), quoting from Burns, unpublished paper for Arden House Conference (1968). (Emphasis in original).

> comforts and luxuries. Psychologically they seek the securities that appeal to other Americans. They hold, with little qualification, to the same proprieties of social conduct." L. Irelan, ed., *Low Income Life Styles* (HEW 1971) (A. 405).

The results of *fifty-two* recent empirical studies, which are "remarkably consistent in their findings and [are] of generally high research quality," Schiller, *supra* at 20 n. 1, were recently summarized as follows:

> "Fortunately, the subject of work motivation is one of the most frequently researched issues in federally funded projects, so that ample data exist to guide policy decisions in this area. Information on motivation has been assembled from (1) actual work behavior, (2) expressed aspirations and attitudes, and (3) comparative profiles of employed and nonemployed poor. All of the data collected are markedly consistent and imply that the assumption that welfare recipients require extraordinary world-of-work orientation or other forms of motivation stimulus is *not* well founded."
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> . . . Comparative studies of employed and unemployed poor indicate that these groups share virtually identical aspirations and attitudes. [References omitted]. What distinguishes the employed from the nonemployed poor at any point in time is not work ethic, but a combination of job opportunities and demographic problems. [References omitted]. . . . Indeed, some studies have even suggested that the poor have a *stronger* commitment to work than the nonpoor, implying that the motivation issue is a middle-class conceit. [References omitted].
>
> [T]he Manpower Report of the President has recognized that 'contrary to a widely held opinion, what the great majority of poor people need is not a stronger work ethic but added skills and more

employment opportunities." Schiller, *Empirical Studies of Welfare Dependency: A Survey* 8 Journal of Human Resources 21-22 (1973 Supp.).[71]

Thus the best available information shows that "there is no observable tendency for the poor to reject economic opportunities [i.e. work] for the 'comfort' of welfare status." *Id.* at 27.

The experience of the researchers is especially relevant in the case at bar because they have carefully studied the behavior and values of persons who, like plaintiffs, have applied for public assistance. The Manpower Administration funded a major study of the work attitudes of more than four thousand welfare recipients:

> "Evidence from this study unambiguously supports the following conclusion: poor people-males and females, blacks and whites, youths and adults-identify their self-esteem with work as strongly as the non-poor. They express as much willingness to take job training if unable to earn a living and to work even if they were to have an adequate income. They have, moreover, as high life aspirations as do the non poor and want the same things, among them a good education and a nice place to live. *This study reveals no differences between poor and nonpoor when it comes to life goals and wanting to work.*" Goodwin, *Do the Poor Want to Work? A Social-Psychological Study of Work Orientations*, 112 (Brookings, 1972) (A. 436). (Emphasis added).

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[71] A bibliography of the reports of thirty-four research projects of the U.S. Departments of Labor and HEW, and eighteen other research projects, is set forth with Schiller's analysis of the research findings. *Id.* at pp. 30-32.

In proposing a new guaranteed minimum income, or "negative income tax" program,[72] the President's Commission on Income Maintenance Programs significantly did not recommend *any* work requirement as a condition of eligibility for guaranteed income maintenance payments. President's Commission on Income Maintenance Programs, *Report: Poverty Amid Plenty, The American Paradox* 8, 59 (1969). The Presidential Commission found it unlikely that people would quit work for the purpose of qualifying for a guaranteed minimum income:

> "[W]e do not believe that employment tests are needed. *Our observations have convinced us that the poor are not unlike the nonpoor.* Most of the poor want to work. They want to improve their potential and to be trained for better jobs. Like most Americans, the poor would like to do something with their lives beyond merely subsisting." *Id.* at 59-60. (Emphasis added).

To find out whether poor people would actually quit their work for the purpose of qualifying for public assistance without work rules, the United States Office of Economic Opportunity expended over eight million dollars in "the most ambitious socio-economic experiment ever undertaken in America without a base in legislation or executive order." G. Steiner, *The State of Welfare* 96 (Brookings, 1971). Low-income workers in New Jersey were offered a guaranteed income without

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[72] The Commission made a comprehensive analysis of the existing public assistance structure and found that it "has severe flaws that prevent it from reaching all of the poor effectively." President's Commission on Income Maintenance Programs, *Report: Poverty Amid Plenty, The American Paradox* 4 (1969).

any work requirements. A self-reporting declaration system, analogous to federal income tax returns, was the basis for determining the amount of benefits paid. The New Jersey experiment was expressly designed to answer the question"whether cash allowances, whose net benefits decline as work income increases, significantly reduce work by the recipients." J. Pechman & P. Timpane, *Work Incentives and Income Guarantees* 1 (Brookings, 1975). The subjects of the study were persons who, like plaintiffs, if they quit work and became needy, would qualify for "whatever low-level grants might be made from local general assistance." F. Skidmore, *Operational Design of the Experiment* in J. Pechman & P. Timpane, *supra* at 28.[73]

Upon completion of the New Jersey experiment, the researchers summed up their findings as follows:

> "[A] negative tax type plan with a basic benefit as high as the official poverty line will not trigger large-scale reductions in work effort among male heads of families. Indeed, there is no evidence here that even a small proportion of male heads would drop out of the labor force completely because of such a plan; small labor force reductions are likely to be spread over large numbers of workers. Without a mandatory work requirement the male heads of families maintained high levels of labor force participation under all of the experimental

[73]"Public debate on the issue of a universal guaranteed income of some kind generally had narrowed down to the question of the possible idleness of the working poor. Able-bodied males were the only people in American society who as a group had never qualified for [federal categorical] public assistance." F. Skidmore, *supra* at 28.

> plans." Institute for Research on Poverty, *The New Jersey Graduated Work Incentive Experiment:* Summary Report, vi-vii (1973).

The results of the New Jersey study clearly show that poor workers are unlikely to drop out of the labor force for the purpose of obtaining welfare benefits, even where the benefits are provided without a work requirement. I. Garfinkel, *Income Transfer Programs and Work Effort: A Review*, in Subcommittee on Fiscal Policy, Joint Economic Committee, *Studies in Public Welfare*, Paper No. 13, 13 (93d Cong. 2d Sess.).[74] After this vast empirical study, the burden of proof is now on those who assert that income maintenance programs like Home Relief cause people to quit their jobs for the purpose of qualifying for public assistance. J. Pechman & P. Timpane, *supra* at 11, 87.

Another study has carefully analyzed the relationship between labor force participation of able-bodied males and the amount of general assistance benefits available in different areas, to determine whether in areas where general assistance benefits are higher, people would leave their jobs to obtain them. The researchers concluded:

> "[W]e found no significant association whatsoever between public welfare expenditures and [labor force participation of able-bodied males, aged

[74]Small amounts of reduction of *hours* worked by some persons in the New Jersey experiment were consistent with predictions of the President's Commission that "reduced work effort is likely to be concentrated among secondary family workers, female family heads, and the elderly, rather than among non-aged family heads." President's Commission on Income Maintenance Programs, Report: *Poverty Amid Plenty, The American Paradox* 8 (1969).

18-54]. If the availability of public welfare payments in an area has deterred prime-aged males from participating in the labor force, it is not evident in these data." W. Bowen and T. Finegan, *The Economics of Labor Force Participation* 72 (Princeton University Press 1969) (A. 383-392).

This study is significant because it also shows that there is no factual support for an assumption that the availability and amount of general assistance causes persons to drop out of the labor force for the purpose of obtaining public assistance.

A Manpower Administration study was also conducted to determine whether any identifiable class of persons disadvantaged due to racial discrimination, poverty, a lack of education, skills, prior work experience, and other factors is predisposed to terminate employment. The Manpower Administration studied the duration of employment of disadvantaged persons in an attempt to discover why they terminated their jobs. The researchers found that:

> "A number of background work attitudes, or predispositions, appeared to be related to participation or entry into the labor force, but these attitudes had little or no connection to the person's duration on the job, once he had it. *Once on the job, other attitudes, related to the immediate job, appeared to be associated with duration on that job.*" U.S. Department of Labor, Bureau of Labor Statistics Report 401, *Work Attitudes of Disadvantaged Black Men.* (U.S. G.P.O., 1972) (A. 430). (Emphasis added).

In sum, the available information supplied by extensive recent research into the behavior and attitudes of poor people and welfare recipients shows that they have the same work ethic as other people, and that

they, like other people, are likely to terminate their employment for ordinary reasons, and not for the purpose of qualifying for welfare benefits. Thus, present day experience and the facts known about poor people and welfare recipients do not establish a sufficient connection between the given facts and the purpose presumed by statute. *Cf., Mobile, J.&K.C.R.R. v. Turnipseed,* 219 U.S. 35 (1910).

In addition, considerations of fundamental fairness militate against the use by defendant and his agents of the presumption. In operation, the presumption imposed upon plaintiffs the heavy burden of proving a negative to the satisfaction of defendant and his agents.

In sharp contrast to the severe harm suffered by plaintiffs due to the enforcement of the presumption, defendant makes spurious claims that the presumption is administratively necessary. For example, he claims at one point that the presumption is necessary because

> "it would not be feasible for the social services agency to establish affirmatively in every case the reasons why the applicant left his job." Brief for Appellant, p. 23.

But in the court below, defendant's officer having "immediate responsibility for the operations" of the New York State Department of Social Services, Executive Deputy Commissioner Edward W. Maher (A. 443), swore, contrary to all of the evidence in this case, that "the determinations [to impose the 75-day sanction] are based on evidence, *not* on presumption. . . ." (A. 453). (Emphasis added). The State Commissioner should not now be heard to complain of a judgment that has only directed him to implement

what he represented to the three-judge court as already being his policy.[75]

Defendant now argues that the presumption is necessary to render "the public assistance programs workable," Brief for Appellant, p. 23, because otherwise "it would be virtually impossible" to determine why a person terminated employment, *Id.* at 30. But he simultaneously concedes that "even if the District Court's opinion were affirmed," "the local .... agency still has the duty to determine whether, in fact, the applicant terminated his employment for the purpose of [qualifying for Home Relief assistance]...." *Id.* at 47. Contrary to defendant's inconsistent argument that the presumption is at the same time both indispensable and superfluous, in reality the presumption was unnecessarily and arbitrarily used to deprive individuals of aid necessary to their existence without a determination of the actual facts.

The use of such a presumption against the plaintiffs is fundamentally unfair. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this Court held that "the opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." *Id.* at

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[75]In addition, the instructions issued to comply with the order of the three judge court require decisions on imposition of the sanctions to be based upon findings "from all available evidence as a fact." (Appendix "C" to this brief) And the State Commissioner's Executive Deputy represented that

> "the determination whether section 131[(11)] applies to a given applicant for public assistance always involves an evaluation of the facts of the particular case, both as to whether the termination was voluntary and whether the purpose was to obtain public assistance." (A. 449).

268-9. Presumptions are sophisticated legal rules that at times are difficult even for lawyers to comprehend and overcome. *See Laskey Bros. of W. Va. Inc. v. Warner Bros. Pictures*, 224 F.2d 824, 827 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956). In the case at bar, "those persons to whom the presumption is directed are typically the least capable socially, intellectually, economically and physically to employ the means to rebut the presumption." *Owens v. Roberts*, 377 F.Supp. 45, 53 (M.D. Fla. 1974) (three-judge court). *Accord, Goldberg v. Kelly, supra* at 269; *Milne v. Berman*, 384 F. Supp. 206, 212 (S.D.N.Y. 1974) (three-judge court). As the court below stated, "what we are concerned with here is a matter of fairness.... To require the plaintiffs to [overcome the presumption and] ... to prove their innocent motives for terminating employment is effectively to deny them all chances of obtaining the benefits which they seek." *Milne v. Berman, supra.* Although plaintiffs do not oppose an inquiry into the reason for job termination, it is unfair for defendant to presume the answer without factual support.

In conclusion, the presumption that plaintiffs terminated their employment for the specific purpose of qualifying for Home Relief assistance lacks the necessary rational connection. The presumption is contrary to general experience because it is far more likely for people to terminate employment for ordinary reasons related to their work and personal problems than for the purpose of qualifying for Home Relief assistance, particularly when it is considered that the low amount of benefits are conditioned upon rigorous work and means tests. Moreover, the available information about the behavior of people who have applied for

and who receive welfare benefits, studies of the reasons why people quit employment, and experiments actually offering minimum guaranteed incomes without any work requirement, all show that poor people and welfare recipients have the same work ethic as other people have, that when they terminate their employment, they do so for the same kinds of ordinary common sense reasons as the nonpoor, and that they do not terminate their employment for the purpose of qualifying for public assistance. Because there is no rational connection between the given facts and the purpose presumed by the statute, the presumption violates the Due Process Clause. *Mobile, J.& K.C.R.R. v. Turnipseed,* 219 U.S. 35 (1910).

II.

DEFENDANT'S ENFORCEMENT OF NEW YORK SOCIAL SERVICES LAW, §131(11) VIOLATES THE DUE PROCESS CLAUSE BECAUSE THE TIMING OF THE STATE'S FAIR HEARING PROCEDURE DEPRIVED PLAINTIFFS OF AN OPPORTUNITY TO REBUT THE PRESUMPTION PRIOR TO THE IMPOSITION OF THE SANCTION, AND DURING THE SEVENTY-FIVE DAY STATUTORY SANCTION PERIOD

On its face, the statutory presumption purports to be rebuttable. In operation, however, the timing of the State's "fair hearing" procedure deprived plaintiffs of a fair opportunity to rebut the statutory presumption. Plaintiffs were not afforded any opportunity to rebut the presumption prior to the imposition of the

sanctions. Moreover, the fair hearings afforded plaintiffs were generally not determined until well into or even after the end of the seventy-five day sanction period. While waiting for their fair hearing decisions, the sanctions caused plaintiffs grave hardships. Several went hungry and were evicted or threatened with eviction.

Plaintiffs contend that they were denied a fair opportunity to rebut the statutory presumption; that Due Process requires that the opportunity to rebut the presumption be afforded prior to the imposition of the statutory sanctions; and that defendant's failure to provide a timely opportunity to rebut had the effect of turning the statutory rebuttable presumption into a conclusive presumption during the seventy-five day period.

A. The State's Procedures Did Not Afford Plaintiffs A Fair Opportunity to Rebut The Presumption.

It is well established that for a rebuttable presumption to comport with the Due Process Clause, a party must be afforded a "fair opportunity" to present evidence to rebut it. *Adler v. Board of Education,* 342 U.S. 485, 495 (1952); *Heiner v. Donnan,* 285 U.S. 312, 329 (1932) ("...a fair opportunity to rebut it...."); *Bandini Petroleum Co. v. Superior Court,* 284 U.S. 8, 19 (1931) ("...a full opportunity to present all the facts...."); *Manley v. Georgia,* 279 U.S. 1, 6 (1929); *Western & A. R.R. v. Henderson,* 279 U.S. 639, 642 (1929); *Lindsley v. National Carbonic Gas Co.,* 220 U.S. 61, 82, 1911); *Mobile, J. & K.C.R.R.*

v. Turnipseed, 219 U.S. 35, 43 (1910) ("...a reasonable opportunity to submit ... all of the facts bearing upon the issue...."); *Bailey v. Alabama*, 219 U.S. 219, 238 (1911).

This Court has held that "(i)n reviewing state action in this area ... we look to substance, not to bare form, to determine whether constitutional minimums have been honored." *Bell v. Burson*, 402 U.S. 535, 541 (1971); *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 106-107 (1963) (Goldberg, J. concurring); *Oyama v. California*, 332 U.S. 633, 636 (1948). Looking to substance rather than form, it is clear from the record that plaintiffs were not afforded a fair opportunity to rebut the presumption and were the victims of "reflexive" impositions of statutory sanctions. *Owens v. Roberts*, 377 F. Supp. 45, 52 (M.D.Fla. 1974) (three-judge court).

Defendant claims that plaintiffs could rebut the presumption at the local social services offices. The record is clear, however, that plaintiffs were not afforded any opportunity to rebut the statutory presumption at the time they applied for assistance at local offices of the New York Department of Social Services. 18 N.Y.C.R.R. Parts 350 and 351. Plaintiffs were simply given terse notices by local officials that they were "sanctioned" for seventy-five days because they had terminated their employment within seventy-five days of their application for public assistance, and that if they were not satisfied with this determination, they could request a fair hearing from the New York State Department of Social Services. (A. 29, 43-44, 72,

173-174, 242-243, 312, 316, 590-595, 636-637, 641).[76]

Plaintiffs were not even informed at the local agency of the existence of the presumption and that they could submit evidence to the local agency to rebut it. Nor do the State regulations quoted in the State Commissioner's Brief, pp. 44-45, require the local agency to inform persons who are sanctioned of the existence of the presumption and how it operates.

Plaintiffs were not afforded a hearing of any kind at the local agency. They had not received prior notice of the reason for the imposition of the sanction, i.e., a presumed motive on their part to qualify for assistance, and thus did not have an opportunity to confer with counsel, and to gather and present relevant evidence. In addition, they had no opportunity to obtain a decision from an impartial decision maker. All of the minimal due process protections were absent at the time the sanctions were imposed. *See generally, Goldberg v. Kelly*, 397 U.S. 254 (1970). As this Court stated in *Roller v. Holly*, 176 U.S. 398, 409-410 (1900):

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[76]The notice of assistance denial given to a person who is sanctioned delineates the scope of the issues at the fair hearing. 18 N.Y.C.R.R. §358.11(e). See *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974); *In re Ruffalo*, 390 U.S. 544, 550 (1968). A recent study concluded "that 60 percent of the hearing appellants had received little or no information at the center to further explain the agency's action beyond the statement given on the advance notice." D. Baum, *The Welfare Family and Mass Administrative Justice*, Appendix B, 93 (Praeger, 1974). Defendant's unsupported claim that the presumption "is easily rebuttable" is completely refuted by the record. In addition, plaintiffs could not "easily rebut" a presumption they did not know existed.

> "[A] man should not be required . . . instantly to answer a charge . . . on the same or even the next day and should be allowed not only ample time to obtain legal advice and assistance, but also to collect his evidence; and even the convenience of witnesses should be considered; and therefore in general several days should intervene between the time of summons and hearing."

See also, Wolff v. McDonell, 418 U.S. 539, 564 (1974), where the Court disapproved of a procedure where "the inmate first receives notice of the actual charges at the time of the hearing before the Adjustment Committee." *Accord, Morgan v. United States*, 304 U.S. 1, 18 (1938).

The contested statute, which provides that the presumption controls "in the absence of *evidence* to the contrary," itself contemplates that the appropriate place to rebut the presumption is at an administrative hearing. *N.Y. Social Services Law*, §131 (11) (McKinney Supp. 1974) (emphasis added). In *Adler v. Board of Education*, 342 U.S. 485, 495 (1952), the Court stated that

> "the 'phrase *prima facie* evidence of disqualification' as used in the statute, imports a hearing at which one . . . shall be afforded an opportunity to present substantial evidence contrary to the presumption. . . ."

In addition, the notices informing plaintiffs of the imposition of the seventy-five day sanction stated that if plaintiffs wished to challenge the sanctions and present "evidence" (A. 243) on their behalf, they could do so by requesting State fair hearings. (A. 29, 43-44, 72, 173-174, 242-243, 312, 316, 590-591, 595, 636-637, 641).

It is thus clear that State fair hearings were the only means to contest the denials of assistance and to refute the statutory presumption. *N.Y. Social Services Law*, §166 (McKinney Supp. 1974); 18 N.Y.C.R.R. Part 358; [Defendant's Answer, ¶¶13-14 (A. 142)][77]

The *timing* of the State's fair hearing procedure, however, renders it totally inadequate for persons who are sanctioned for seventy-five days on the basis of the statutory presumption. Plaintiffs were not provided any opportunity to rebut the presumption prior to the imposition of the sanctions, and generally during the entire seventy-five day sanction periods.

State fair hearings are generally scheduled three to four weeks after they are requested. (Jurisdictional Statement, pp. 5, 25). Moreover, the State Commissioner has ninety days from the date of the hearing request to render a fair hearing decision. 18 N.Y.C.R.R. §358.18.[78] Defendant admits that an expedited hearing

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[77]This hearing procedure was established to comply with this Court's decision in *Goldberg v. Kelly, supra*, and with the decision in *Almenares v. Wyman*, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972).

[78]This regulation setting forth a 90-day time period changed the requirement from the prior 60-day requirement. It is significant that the State regulation does not require that the decision be *implemented* within the 90-day period. With respect to recipients in categorical programs, it has been held that 18 N.Y.C.R.R. §358.18 conflicts with 45 C.F.R. §205.10, which requires a decision *and* implementation within the 90-day period. *Cisco v. Lavine*, 72 Misc.2d 1087, 341 N.Y.S.2d 719 (Sup.Ct. 1973). The State Commissioner has had difficulties complying with the regulatory time requirements. *Nelson v. Sugarman*, 361 F.Supp. 1132 (S.D.N.Y. 1972); *Cisco v. Lavine*, 72 Misc.2d 1009, 340 N.Y.S.2d 275 (Sup.Ct. 1973), *modified on reargument*, 72 Misc.2d 1087, 341 N.Y.S.2d 719 (Sup.Ct. 1973). See Brief for Appellant, p. 51.

procedure does not exist for persons denied assistance pursuant to the statutory presumption. [Brief for Appellant, p. 51; Jurisdictional Statement, p. 25; A. 142-143, 544-545].[79]

Defendant's suggestion that an expedited hearing procedure "might be available"[80] pursuant to the decision in *Jones v. Berman*, 37 N.Y.2d 42, 371 N.Y.S.2d 422 (1975) is not well founded. *Jones* only deals with the hearing rights of persons denied *Emergency Assistance, N.Y. Social Services Law*, §350-j (McKinney Supp. 1974), and not with persons who are sanctioned with a seventy-five day denial of *Home Relief* assistance under the challenged statute. Moreover, defendant has admitted that emergency assistance is not available to a person who has been sanctioned under Section 131(11). *Milne v. Berman*, 384 F. Supp. 206,

[79]In addition, the evidence indicates that the State takes the longest amount of time to render fair hearing decisions in cases of persons denied assistance. *Nelson v. Sugarman*, 361 F.Supp. 1132, 1141 (S.D.N.Y. 1972); *Cisco v. Lavine*, 72 Misc.2d 1009, 340 N.Y.S.2d 275, 283, *modified on reargument*, 72 Misc.2d 1087, 341 N.Y.S.2d 719, 724-725 (Sup.Ct. 1973); D. Baum, *The Welfare Family and Mass Administrative Justice*, Community Evaluation of Fair Hearing Procedures to Public Assistance Recipients, Appendix B, 100 (Praeger, 1974). Unlike cases of welfare termination or reduction which are "aid continuing," 18 N.Y.C.R.R. §358.8(c)(1), where the State has a financial incentive to render prompt decisions, the State has no such incentive to render prompt decisions in cases of persons denied assistance. *Cisco v. Lavine*, 72 Misc.2d 1009, 340 N.Y.S.2d 275, 283 (Sup.Ct. 1973). Cf. *Arnett v. Kennedy*, 416 U.S. 134, 224 (1974) (Marshall, J. Douglas, J. and Brennan, J. dissenting) ("[T]hese agencies which take three months or more to hold post termination hearings have little incentive to decide dismissal cases more promptly, since the employee has already been discharged and he bears most of the costs of delay.")

[80]Brief for Appellant, 49.

212 n. 6 (S.D.N.Y. 1974) (A. 572); *N.Y. Social Services Law*, §133 (A. 480-481, 545-546).

Since the State Commissioner has up to ninety days from the date of the hearing request to render a fair hearing decision, a person who is sanctioned pursuant to the statutory presumption has no opportunity to rebut the presumption prior to the imposition of the sanction and generally during the entire seventy-five day statutory sanction period. For example, proposed intervenors Reid and Brownlee did not receive their fair hearing decisions until after the end of the 75-day sanction period. (A. 294-295, 297-298).[81] Class member Phillips received his Decision After Fair Hearing more than three months after employment termination. (A. 310; *Matter of Allen Phillips*, Fair Hearing Decision, April 29, 1974, annexed hereto as Appendix "A"). Class member Scarfone received his Decision After Fair Hearing 68 days after employment termination. (A. 319-321).[82] And, intervenor Lee's hearing was not

[81]There is some discrepancy as to Brownlee's date of employment termination. While the Decision After Fair Hearing lists this date as March 13, 1973, (A. 306), Brownlee's counsel's affidavit and the Statement Pursuant to Rule 9(g) of the Civil Rules for the Southern and Eastern Districts of New York set forth without contradiction by defendant the date of termination as March 2, 1973. (A. 256, 297). Moreover, the Decision of the New York State Department of Labor sets forth the date as March 2, 1973. (A. 300).

[82]The time periods of proposed intervenors Brownlee and Reid and class member Scarfone are probably most indicative of the time lapse between hearing request and decision since these were persons who received fair hearing determinations prior to seeking any relief from the Court.

even scheduled until after the seventy-five day period. (A. 255).

Defendant's fair hearing procedure does not provide a "fair" or "reasonable opportunity" to rebut the statutory presumption. A hearing determination rendered after the end of the statutory sanction period is "totally meaningless"[83] to a needy person who has gone hungry or faced eviction as a result of the sanctions imposed under the challenged statute.

B. Due Process Requires A Hearing Prior To The Imposition Of A Seventy-Five Day Sanction.

Because the imposition of the seventy-five day sanction causes a significant taking and severe harm, a fair opportunity to rebut the statutory presumption requires that defendant afford hearings and render determinations prior to the imposition of the statutory sanctions:

The imposition of the seventy-five day sanctions constituted significant forfeitures of assistance that otherwise would have been provided. These were penalties imposed because of a presumed wrongful purpose in job termination. Defendant's Brief, pages 3, 7, 13, 55, the State regulation which tracks the contested statute, 18 N.Y.C.R.R. §385.7, several of the denial notices, administrative letters and fair hearing decisions repeatedly refer to the imposition of a "sanction." (A. 29, 58, 242-243, 282, 454-455, 631, Fair Hearing Decision of Shirley Miller, annexed to this

[83]*Milne v. Berman*, 384 F.Supp. 206, 211 n. 5 (S.D.N.Y. 1974) (A. 577).

Brief as Appendix "B".) *Cf.* 18 N.Y.C.R.R. §370.4(h)(2); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144,169 (1963).[84] Since property interests "are created and their dimensions are defined by" state law, defendant's recognition of the punitive nature of the seventy-five day forfeiture is significant. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Moreover, plaintiffs "had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them." *Id*, at 577. *Accord, Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963); *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117, 123 (1926); *Bratton v. Chandler*, 260 U.S. 110 (1922); *Hornsby v. Allen*, 326 F.2d 605, *adhered to on rehearing*, 330 F.2d 55 (5th Cir. 1964). See generally, *Arnett v. Kennedy*, 416 U.S. 134, 179-180 (1974) (White, J., concurring in part and dissenting in part).

The opportunity for a hearing must be "appropriate to the nature of the case." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950); *Bell v. Burson*, 402 U.S. 535, 540 (1971). This requires that the hearing be granted "at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). A meaningful time is "a time when the

[84]Historically, sanctions were imposed on vagrants both in England and in this country. J. Feagin, *Subordinating the Poor: Welfare and American Beliefs* 18 (Spectrum, 1975) "In seventeenth century Massachusetts, Rhode Island and Connecticut there were laws for the imprisonment or whipping of the able-bodied unemployed." *Id.* at 25. While plaintiffs do not contend that the sanctions are criminal penalties, *Flemming v. Nestor*, 363 U.S. 603 (1960), it is significant that several of the fundamental aspects of a criminal penalty are present: an affirmative disability, based on scienter, with a deterrent purpose. *See Kennedy v. Mendoza-Martinez, supra* at 168.

deprivation can still be prevented." *Fuentes v. Shevin, supra* at 80; *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340-341 (1969).[85] In enforcing the statutory presumption, defendant does not hold, determine and implement hearings at a time when the harm and deprivation that result from erroneous determinations can be prevented.

In determining whether the timing of a hearing procedure comports with the Due Process Clause, this Court has weighed (a) the gravity of the deprivation and the harm to the claimant and (b) the risk that the initial determination may be erroneous, against (c) the administrative burden and expense. *Arnett v. Kennedy*, 416 U.S. 134, 168-169, 190-192 (1974) (Powell, J. concurring) (White, J. concurring in part and dissenting in part); *Goldberg v. Kelly*, 397 U.S. 254 (1970). See also, *Goss v. Lopez*, 419 U.S. 565, 579 (1975); *Board of Regents v. Roth*, 408 U.S. 564, 570 (1972); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

"The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.' "

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[85]This Court's recent due process cases have often focused on the requirement that hearing procedures be afforded at a meaningful time. E.G., *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Stanley v. Illinois*, 405 U.S. 645, 647 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Armstrong v. Manzo*, 380 U.S. 545 (1965). See also, *Fusari v. Steinberg*, 419 U.S. 379, 95 S.Ct. 533, 539-540 (1975).

Goldberg v. Kelly, 397 U.S. 254, 262-263 (1970), quoting from *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951). The imposition of a seventy-five day sanction of public assistance benefits can deprive a person of the very means to subsist while awaiting a fair hearing decision. *See Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969) ("[I]n the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard. . . ."). "[T]o the hungry 75 days is sufficient time in which to starve." *Milne v. Berman*, 384 F. Supp. 206, 212 (S.D.N.Y. 1974) (A. 572). During this time, under New York law, a needy individual cannot even obtain a grant of emergency assistance. *Milne v. Berman, supra* at 212 n. 6; *N.Y. Social Services Law*, §133. (A. 480-481, 545-546). And, compounding the harm is the fact that the 75-day sanction has been imposed on the basis of a presumed wrongful intent rather than on the basis of actual facts.[86]

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this Court held that because of the severe, irreparable harm that attends a denial of public assistance, due process requires a hearing prior to its deprivation. See also,

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[86]The possibility of obtaining retroactive benefits is small comfort to a person who has been wrongfully sanctioned and deprived of the means to subsist for the seventy-five day period. Cf. *Nash v. Florida Industrial Commission*, 389 U.S. 235,239 (1967). For example, although class member Scarfone prevailed at his hearing, he was forced to leave his apartment because he could not pay his rent while awaiting his decision. In any case, "(t)his Court has not, however, embraced the general proposition that a wrong may be done if it can be undone." *Stanley v. Illinois*, 405 U.S. 645, 647 (1972); *Fuentes v. Shevin*, 407 U.S. 67, 83 (1972).

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). The Court in *Goldberg* stated:

> "For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care.
>
> Thus the crucial factor in this context—a factor not present in the case of the black-listed government contractor, the discharged government employee, the taxpayer denied a tax exemption or virtually anyone else whose governmental largesse is ended—is that *termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.* Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistance, in turn, adversely affects his ability to seek redress from the welfare beauracracy." *Goldberg v. Kelly, supra* at 264. (Emphasis added).[87]

Unlike the discharged public employee, who may be able to secure a job in the private sector, or who may be eligible for unemployment compensation or public assistance, *Arnett v. Kennedy*, 416 U.S. 134, 169 (1974) (Powell, J. concurring), and unlike a person denied unemployment compensation benefits, who may still be eligible for public assistance, *Torres v. New York State Department of Labor*, 321 F. Supp. 432, 437 (S.D.N.Y. 1971) (three-judge court), *vacated and remanded*, 402 U.S. 968 (1971), an unemployed person denied public assistance has no other source to meet his

[87]This Court also recognized the critical importance of public assistance benefits in *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 259, (1974) and in *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969).

minimal subsistance needs. *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).[88] This is substantiated by the cases of plaintiff Milne[89] and the numerous other persons who were sanctioned for seventy-five days on the basis of the statutory presumption, and who were severely harmed because they had no money for food and rent. (A. 12-13, 39, 64-66, 90, 152, 278, 287-288, 311, 589, 594, 635, 640, 652, 655).

The risk that the initial agency decision was in error is also fundamental in determining the procedures required by the Due Process Clause. *Arnett v. Kennedy*, 416 U.S. 134, 170, 190, 194 (1974) (Powell, J. concurring) (White, J. concurring in part and dissenting in part); *Goldberg v. Kelly*, 397 U.S. 254, 26 n. 12 (1970). *See Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 739 (1975); *North Georgia Finishing Co. v. Di Chem*, 419 U.S. 601, 608 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 618 (1974). "Rules of procedure are often shaped by the risk of making an erroneous

[88]Even in the context of unemployment compensation, the timing of procedures is significant. In *Fusari v. Steinberg*, 419 U.S. 379, 95 S.Ct. 533, 540 (1975), the Court stated: "In this context, the possible length of the wrongful deprivation of unemployment benefits is an important factor in assessing the impact of official action on the private interests. Cf. Arnett v. Kennedy, 416 U.S. 134, 168-169, 94 S.Ct. 1633, 1651-1652, 40 L.Ed.2d 15 (Powell, J. concurring); *Id*, at 190, 192, 94 S.Ct. at 1662, 1663 (White, J. concurring in part and dissenting in part). Prompt and adequate administrative review provides an opportunity for consideration and correction of errors made in initial eligibility determinations. Thus, the rapidity of administrative review is a significant factor in assessing the sufficiency of the entire record."

[89]Plaintiff Milne and proposed intervenor Brownlee were erroneously denied unemployment compensation. (A. 268, 300-301).

determination." *Arnett v. Kennedy, supra* at 201. (White, J. concurring in part and dissenting in part). *See also In re Winship,* 397 U.S. 358, 368-373 (1970) (Harlan, J. concurring). It is clear from the record that defendant and his agents made a great number of erroneous determinations in imposing sanctions on the basis of the statutory presumption. See Brief for Appellant, p. 18, referring to the "misapplication" of Section 131(11), but ignoring the harm resulting from the misapplications.

The "welfare bureaucracy's difficulties in reaching correct decisions on eligibility" have been well documented. *Goldberg v. Kelly, supra* at 264 n. 12, citing Comment, *Due Process and the Right to a Prior Hearing in Welfare Cases,* 37 Ford.L.Rev. 604, 610-611 (1969); *Arnett v. Kennedy,* 416 U.S. 134, 190, n. 10 (1974) (White, J. concurring in part and dissenting in part), citing Handler, *Justice for the Welfare Recipient: Fair Hearings in AFDC–The Wisconsin Experience,* 43 Soc.Serv.Rev. 12, 22 (1969); D. Baum, *The Welfare Family and Mass Administrative Justice, Community Evaluation of Fair Hearing Procedures to Public Assistance Recipients,* Appendix B, p. 88 (Praeger, 1974); O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases,* The Supreme Court Review 171 (1970). There is an "unusual risk of error inherent in the welfare eligibility process. . . ." O'Neil, *Of Justice Delayed and Justice Denied, supra* at 171. See also *Yee-Litt v. Richardson,* 353 F. Supp. 996, 999-1000 (W.D.Cal.1973) (three-judge court), *aff'd sub nom Carleson v. Yee-Litt,* 412 U.S. 924 (1973). One study reveals that with respect to cases of persons denied assistance in New York, the local agency is

upheld in only thirty eight percent of the cases after State fair hearings. D. Baum, *The Welfare Family and Mass Administrative Justice, Community Evaluation of Fair Hearing Procedures to Public Assistance Recipients,* Appendix B, 88 (Praeger 1974).[90] As this Court has concluded, "(t)he stakes are simply too high for the welfare recipient, and the possibility of honest error or irritable misjudgment too great" to allow the State to forfeit assistance without a *prior* hearing. *Goldberg v. Kelly,* 397 U.S. 254, 266 (1970), quoting from *Kelly v. Wyman,* 294 F. Supp. 893, 904-905 (S.D.N.Y. 1968) (three-judge court). When the State acts on the basis of presumptions and does not attempt to ascertain the actual facts, the probability of error is increased.

The high rate of error in the welfare decision making process has been attributed to the "heavy caseloads placed upon often inexperienced caseworkers, the high rate of turnover among caseworkers, the difficulty of generating accurate information about a population that is frequently anonymous and difficult to reach and with whom communication is severely hampered by suspicion and by barriers of language and culture. . . ." O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases,* The Supreme Court Review, 171 (1970). *Accord,* Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes On The Assurance of Accuracy, Fairness, And Timeliness In The Adjudication of Social Welfare*

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[90]National statistics indicate that from January to June, 1974, persons challenging all welfare department determinations prevailed in 38.9 percent of the cases after requesting fair hearings. United States Department of Health, Education and Welfare, *Fair Hearings in Public Assistance* 11 (January, 1975). "The state reversed 50 per cent of [New York] City's actions from April through August [1975]. . . .even after the city itself withdrew initial actions against clients in 30 per cent of [the fair hearings]. . . ." N.Y. Times, Oct. 17, 1975, p.15, col. 2.

Claims, 59 Cornell L.Rev. 772, 814 (1974); Comment, *Due Process and the Right to A Prior Hearing in Welfare Cases*, 37 Ford.L.Rev. 604, 610 (1969).

In addition, "intense public and political pressures to 'cut costs' have had the pernicious effect of forcing welfare departments to be both oversensitive to keeping persons off relief rolls and in not allowing the agencies to improve their internal administrative practices." Comment, *Due Process and the Right to a Prior Hearing in Welfare Cases, supra* at 610-611 (1969), citing United States Department of Health, Education and Welfare, *Report of the Advisory Council on Public Welfare* 73 (1966); F. Piven and R. Cloward, *Regulating the Poor: The Functions of Public Welfare* 147-156 (Vintage 1972).[91]

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[91]The Administrator of the New York City Human Resources Administration has recently recognized this political pressure to refuse assistance to needy persons:

> "I am in the process of revamping restrictive policies from an earlier administration that, I fear, were designed to support 'Zero Caseload Growth.' For example, in the monthly management reports of the Division of Eligibility Controls, those Centers with the highest rejection and closing rates have been getting the highest performance grades. Those with the highest growth rate, the lowest mark—without regard to either demographic changes or the quality of case management. . . .
>
> It is just such an attitude, reflected both in administrative practices and society at large, that must be changed. For it is quite possible that our current welfare policies and practices are creating as much or more suffering on the part of the really poor than at any time in our history. . . . The key question to be asked . . . is: *What's happening to those people?* Were these rejections valid? Are they indeed surviving without assistance, or have they already fallen below the netherworld boundary of marginal existence that is public welfare? Without money and without services?" J. Dumpson, Address to the American Public Welfare Association Northeast Regional Conference, September 6, 1974. (Emphasis in original).

This speech was entered into evidence as Plaintiffs' Exhibit No. 39 during trial in *Perez v. Lavine*, (S.D.N.Y. 73 Civ. 4577, filed October 20, 1973).

The probability of initial error is particularly great in the instant case since the crucial fact is the subjective purpose that a person had for leaving his job up to two and one half months before the date of application for public assistance. Unlike some facts, such as family composition, income, and residence, which are objective and capable of easy verification, subjective purpose, like the issue of fault in *Bell v. Burson*, 402 U.S. 535, 540 (1971), "is a factual issue inherently subject to factual determination and adversarial input." *Mitchell v. W.T. Grant*, 416 U.S. 600, 617 (1974). See generally, *Goldberg v. Kelly*, 397 U.S. 254, 269-270 (1970); *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959).[92] The high risk of error is substantiated by the fact that of the twenty one persons sanctioned whose cases were before the district court, not one left his or her job for the purpose of qualifying for public assistance.

The high risk that the local agency, acting on the basis of presumed facts, will err in determining subjective purpose, coupled with the severe harm that results from a forfeiture of public assistance, requires that defendant afford plaintiffs an opportunity to rebut the presumption at a hearing which is determined *prior* to the imposition of the seventy-five day sanctions.

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[92]Compare New York's procedures with the two step hearing procedure and sixty day "cooling off" period before termination of AFDC benefits for a person who refused to register for WIN, or accept employment or training. 42 U.S.C. §633(g); 29 C.F.R. §570.0 et seq.; 45 C.F.R. §205.1.

Goldberg v. Kelly, 397 U.S. 254 (1970); O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases*, The Supreme Court Review, 171 (1970).

Since defendant already affords hearings to persons denied assistance pursuant to the challenged statute, *N.Y. Social Services Law*, §166; 18 N.Y.C.R.R. §358.4, the only administrative burden to the Department of Social Services is that which would result from rendering hearing determinations prior to the imposition of sanctions. This furthers rather than conflicts with New York's interest in carrying out its public assistance program. *Goldberg v. Kelly, supra* at 264-26. *See also Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729 (1975); *Jiminez v. Weinberger*, 417 U.S. 628, 636 (1974); *Stanley v. Illinois*, 405 U.S. 645, 652 (1972).[93] In *Goldberg*, this Court observed that "the very existence of New York's fair hearing procedures for its Home Relief program is itself cogent evidence that the State recognizes the primacy of the public interest in correct eligibility determinations and therefore in the provision of procedural safeguards." *Goldberg v. Kelly, supra* at 266.

This Court has long recognized that important interests may be taken and severe harm may result from unreasonable delay in the determination of a hearing. *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587 (1926). Plaintiffs suffered grave and irreparable harm from the enforcement of the challenged presumption.

[93]The paramount State interest of aiding needy persons is expressed in the New York Constitution, Art. XVII, §1 which provides that "the aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."

This harm could have been avoided if they had been afforded hearings and determinations prior to the imposition of the seventy-five day sanctions.[94]

C. Because of the State's Failure to Provide Plaintiffs With Timely Hearings, The Statutory Rebuttable Presumption Operated As A Conclusive Presumption During The Seventy-Five Day Sanction Period.

Because of defendant's failure to afford plaintiffs a hearing and determination prior to the imposition of the sanctions and during the seventy-five day sanction period, the statutory presumption, which is rebuttable on its face, operated as a conclusive presumption generally well into and sometimes even after the sanction period. For a statutory presumption to satisfy the requirements of the Due Process Clause, it "must not, under the guise of regulation of the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact ... presumed." *Mobile, J. & K.C. R.R. v. Turnipseed*, 219 U.S. 35, 43 (1910). *Cf. Adler v. Board of Education*, 342 U.S. 485, 495 (1952) where the Court stated that "[t]he presumption is not conclusive but arises only at a

[94]This is a context in which "justice delayed [is] justice denied." *Arnett v. Kennedy*, 416 U.S. 134, 221 (1974) (Marshall, J., Douglas, J. and Brennan, J., dissenting).

hearing where the person against whom it may arise has full opportunity to rebut it."

In several recent cases, this Court has held that where important interests are at stake, the state may not conclusively presume facts that are "not necessarily nor universally true in fact," *Vlandis v. Kline*, 412 U.S. 441, 452 (1973), but must provide the private party with a meaningful opportunity to show the actual facts. *Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 644-645 (1974); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973); *Vlandis v. Kline, supra; Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971). *See also Jimenez v. Weinberger*, 417 U.S. 628 (1974).

The interest at stake, representing the very means to subsist, is greater than the interests at stake in *Vlandis, Murry, Jimenez*, and *Bell. Goldberg v. Kelly, supra.*[95] The fact conclusively presumed, termination of employment for the specific purpose of qualifying for public assistance, is a fact which the State, by the very terms of the contested statute and regulation, "purports to be concerned with. . . ." *Vlandis v. Kline*, 412 U.S. 441,

[95]In *Vlandis v. Kline, supra* at 461 n., Chief Justice Burger dissenting, stated: "If appellees' chances of securing higher education were truly in jeopardy as a result of the tuition differential at issue here, there would at least be an arguable basis for special concern, . . . [I] find it impossible to understand why the interest of appellees here amounts to any more or any less than the number of dollars they are required to pay in excess of Connecticut's in-state tuition rate."

446-447 (1973.[96] While the New York Constitution and Social Services Law purports to be concerned with meeting the needs of its indigents[97], and while the contested statute itself purports to impose sanctions only on those persons who *in fact* terminate their employment for the purpose of qualifying for public assistance, *N.Y. Social Services Law*, §131(11), the State Commissioner and his agents generally conclusively presumed during the entire seventy-five day period that employment termination was for the specific purpose of attaining public assistance eligibility.

The State Commissioner has a "reasonable and practicable means" of making the crucial determination. *Vlandis v. Kline*, 412 U.S. 451-452 (1973). The State has a fair hearing procedure which is available to all persons adversely affected by actions of the State Commissioner's agents. 18 N.Y.C.R.R. §358.4. The State can further its interests as well as the interests of its needy citizens by scheduling its fair hearings and rendering determinations prior to the imposition of the seventy-five day sanctions. In this manner, the State will only deny assistance to those persons who *in fact*

[96]In *La Fleur* and *Stanley*, the state purported to be concerned with fitness, in *Murry* with need, in *Vlandis* with bona fide residency, and in *Bell* with fault. *Bell v. Burson*, 402 U.S. 535, 541 (1971); *Vlandis v. Kline, supra*, at 446-447; *United States Department of Agriculture v. Murry*, 413 U.S. 508, 516 (1973) (Stewart, J., concurring). The presumed fact in the instant case is certainly "not necessarily nor universally true in fact." *Vlandis v. Kline*, 412 U.S. 441, 452 (1973). In addition, as in *Vlandis*, the fact is conclusively presumed during the crucial time period.

[97]*N.Y. Constitution*, Art. XVII, §1; *New York Social Services Law*, §§131(1); 131-a(1); 157; 158. (McKinney Supp. 1974)

terminated employment in order to qualify for assistance. While "[p]rocedure by presumption is always cheaper and easier than individualized determination," "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656-657 (1973).[98]

The statute involved in *Weinberger v. Salfi*, 95 S.Ct. 2457 (U.S. 1975) is significantly different from the statute herein. In *Weinberger*, the challenged provision was "an objective criterion" that did not purport to be rebuttable but operated as a "fixed, prophylactic" rule. *Id.* at 2470, 2472.[99] In contrast to the provision in *Weinberger*, the statute in this case deals with a subjective purpose which the statute expressly purports to be determined on a case by case basis. In addition, the "administrative difficulties" that would result in *Weinberger* if the Department of Health, Education and Welfare, a national agency, had to replace its broad policy with case by case determinations "justified the

[98]The difficulty of determining factual issues does not justify the use of a conclusive presumption. *Carrington v. Rash*, 380 U.S. 89 (1965) (bona fide residence); *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974) (medical fitness); *Vlandis v. Kline*, 412 U.S. 441 (1973) (bona fide residence).

[99]The fact that a provision is designed to be a "prophylactic" device is not, by itself, sufficient to justify the use of a conclusive presumption. The rules held unconstitutional in *Vlandis*, *Murry*, and *Jimenez* were, like the challenged provision herein, "measure(s) of social opprobrium; the assumption that the individual has purposely undertaken to evade legitimate requirements." *Weinberger v. Salfi*, *supra* at 2486 (Brennan, J. and Marshall, J. dissenting). *See also*, *Carrington v. Rash*, 380 U.S. 89 (1965). *Cf. Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 376 (1973).

inherent imprecision of a prophylactic rule." *Id.* at 2473, 2476. See *Richardson v. Perales*, 402 U.S. 389, 399 (1971) (Social Security Administration is "of a size and extent difficult to comprehend.")[100] In contrast to the situation in *Weinberger*, New York has not alleged an interest in avoiding individual adjudications, and indeed purports to make case by case determinations of why people leave their jobs. The governmental interest in avoiding individual adjudications, which justified the challenged policy in *Weinberger*, is thus not present in the instant case.

This Court has consistently held that administrative convenience is not a sufficient justification to dispense with minimal due process protections. *Stanley v. Illinois*, 405 U.S. 645, 656-657 (1972); *Bell v. Burson*, 402 U.S. 535, 540-541 (1970); *Goldberg v. Kelly*, 397 U.S. 254, 261, 265-266 (1970). Just as the "additional expense occasioned by [an] expanded hearing [was not] sufficient to withstand" due process requirements in *Bell v. Burson, supra*, it is not sufficient to justify defendant's failure to afford plaintiffs timely hearings and determinations in this case.[101] "[T]he admin-

[100]The provision in *Weinberger* also operated within relatively narrow confines in view of the numerous statutory exceptions to the challenged provision. In the instant case, the presumed purpose applies to *all* persons who terminate employment within seventy-five days of welfare application.

[101]Where the determination after a fair hearing is that a person in fact terminated his employment in order to qualify for public assistance, the State can recoup the payments made during the sanction period from future grants. *N.Y. Social Services Law*, §106-b (McKinney Supp. 1974).

istrative agency certainly has the power to [provide] a speedy hearing" procedure. *Arnett v. Kennedy*, 416 U.S. 134, 193 (1974) (Mr. Justice White, concurring in part and dissenting in part). When the harm to the individual and the probability of error in the decision making process is balanced against the State's administrative inconvenience, it is clear that Due Process requires a hearing prior to the imposition of the seventy-five day sanction.

III.

THE IMPOSITION OF A SEVENTY-FIVE DAY SANCTION ON THE BASIS OF PRESUMED FACTS IS ARBITRARY AND IRRATIONAL IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

Plaintiffs contend that the imposition of the sanctions on the basis of the statutory presumption that they terminated their employment for the purpose of qualifying for public assistance, without an opportunity to rebut it prior to the imposition of the sanction and generally during the entire seventy-five day sanction period, is arbitrary and irrational in violation of the Equal Protection Clause.

The New York State Department of Social Services generally purports to make a careful investigation, evaluation and determination of the actual facts concerning each applicant's eligibility for public assistance. *N.Y.Social Services Law*, §132; 18 N.Y.C.R.R. Parts 351 and 352. See Brief for Appellant,

pp. 44-45.[102] Careful case by case determinations are made of identity, residence, family composition, need, income resources, and employment history. 18 N.Y.C.R.R. §§351.2, 352.11, 352.12, 352.15, 352.16, 352.17, 352.19.

All persons who apply for public assistance in New York, regardless of their physical and mental traits, their work history, and their educational background, except those in the plaintiff class, may apply for assistance unhindered by any statutory presumption.[103] Thus, for example, people who are perfectly capable of working but have chosen not to work for the past several years, for whatever reason, can apply for assistance free of a statutory presumption of any

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[102] The State regulations define investigation as "the collection, verification, recording and evaluation of factual information on the basis of which a determination is made of eligibility and degree of need, or of ineligibility, for any form of public assistance." 18 N.Y.C.R.R. §351.1(a). *New York Social Service Law*, §132 (McKinney Supp. 1974) provides in part that "the object of such investigations shall be to secure the facts necessary to determine whether such person is in need of public assistance. . . . Information shall be sought as to the residence of such person, the name, age, religious faith, physical condition, earnings or other income, and ability to work of all members of the family, the cause of the person's condition, the ability and willingness of the family, relatives, friends and church to assist, and such other facts as may be helpful in determining the treatment which will be helpful to such person."

[103] An exception is that persons who transferred property within one year preceding the date of application for assistance are presumed to have transferred the property for the purpose of qualifying for assistance. *N.Y. Social Services Law*, §§104-a; 158(b) (McKinney Supp. 1974). *See, Owens v. Roberts*, 377 F. Supp. 45 (M.D. Fla. 1974) (three judge court).

motive that they seek to avoid work and obtain welfare. In sharp contrast, needy persons, such as plaintiffs, who may have worked all their lives but who terminated their employment within seventy-five days of their applications for public assistance are singled out for the imposition of sanctions of a seventy-five day denial of assistance based on the *presumption* that they left their employment for the purpose of qualifying for assistance.[104] This procedural disparity is arbitrary and irrational in relation to the purposes of the State's public assistance program and thus violates the Equal Protection Clause.

Plaintiffs do not challenge the general power of the State to deny assistance to persons who *in fact* terminate their employment for the purpose of qualifying for public assistance. *Cf. New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973). Plaintiffs only claim that the State's imposition of a sanction based on assumed rather than actual facts violates the Equal Protection Clause. As this Court stated in *Stanley v. Illinois*, 405 U.S. 645, 652 (1972):

> "E.t we are here not asked to evaluate the legitimacy of the state's ends, rather, to determine whether the means used to achieve these ends are constitutionally defensible."

Where a governmental agency generally makes case by case fact findings to support its determinations, it cannot, consistent with the Equal Protection Clause,

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[104] As set forth in Point II, *supra*, while the statutory presumption is, on its face, rebuttable, it operates so as to conclusively presume the vital fact generally during the entire seventy-five day sanction period.

arbitrarily and irrationally single out one class of persons and make their determinations based on conclusively assumed facts. *Jimenez v. Weinberger*, 417 U.S. 628, 635-637 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Reed v. Reed*, 404 U.S. 71 (1971). *See also United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). This is so whether or not the procedures the State affords the favored class are required by the Due Process Clause. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) (imposition of double appeal bond to appeal from judgment of eviction violates the Equal Protection Clause even though there is no due process right to an appeal). *Cf. Baxstrom v. Herold*, 383 U.S. 107 (1966).

The critical inquiry is whether the denial of benefits to needy persons on the basis of an assumed wrongful motive is rationally related to New York's legitimate interests in carrying out its public assistance programs. *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534-537 (1973); *Jimenez v. Weinberger*, 417 U.S. 628, 636 (1974); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). Compare *Weinberger v. Salfi*, 95 S. Ct. 2457 (1975).

The legislative history of New York Social Services Law §131(11) (McKinney Supp. 1974) states that the purpose of this section is to deter and remove "any potential incentive" for people who are working from leaving their employment for the purpose of qualifying for public assistance. *See* 2 McKinney, New York Session Laws of 1971, p. 2511; Brief for Appellant, p. 8; Jurisdictional Statement, p. 21. Regardless of the rationality of imposing two and one half month denial sanctions pursuant to the first sentence of Section

131(11), the utilization of an assumption that persons leave their employment for the purpose of qualifying for assistance is not rational. *See Stanley v. Illinois*, 405 U.S. 645 (1972).[105]

Indeed, the State spites its own purpose of assisting needy persons when it denies assistance to a needy person who did not *in fact* leave his job in order to qualify for assistance. See Point II, *supra*, at 106, 109-110. *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 739 (U.S. 1975); *Jimenez v. Weinberger*, 417 U.S. 628, 636 (1974); *Stanley v. Illinois*, 405 U.S. 645, 652 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 264-265 (1970). The State statutory-regulatory scheme detailing the extensive efforts the State makes in determining the actual facts of its present and potential recipients "is itself cogent evidence that the State recognizes the primacy of the public interest in correct eligibility determinations and therefore in the provision of procedural safeguards." *Goldberg v. Kelly*, *supra* at 266. The imposition of a sanction that is based on assumed facts which deprives needy persons of assistance is clearly counter to this interest. This is substantiated by the facts of the several plaintiffs, none of whom in fact quit their job in order to qualify for assistance, but all of whom suffered severe harm because they were assumed to have done so.

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[105] By defendant's own admission, the asserted State interests set forth on page 22 of his Brief relate only to the first sentence of Section 131(11) (McKinney Supp. 1974), which is not in issue. Brief for Appellant, p. 22. *See, Milne v. Berman*, 384 F. Supp. 206, 212 (S.D.N.Y. 1974); *Owens v. Roberts*, 377 F. Supp. 45, 51 (M.D.Fla. 1974) (three-judge court).

Analogous situations were presented in *Jiminez v. Weinberger*, 417 U.S. 628 (1974) and *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). In *Jimenez*, the challenged statute denied Social Security disability benefits to certain illegitimate children who were born after the date of disability, the assumption being that such children were not likely to be dependent on the claimant. This Court held that the statute violated the equal protection principles embodied in the Due Process Clause of the Fifth Amendment. The Court stated:

> "Assuming that the appellants are in fact dependent on the claimant, it would not serve the purposes of the Act to conclusively deny them an opportunity to establish their dependency and their right to insurance benefits. . . ." *Jimenez v. Weinberger*, *supra* at 636.

In *Moreno*, the challenged statute, which denied food stamps to households containing one or more unrelated members, was claimed by the government to be justified by its purported purpose to minimize fraud. The government claimed that households with unrelated members were more likely than households where all members were related "to contain individuals who abuse the program by fraudulently failing to report sources of income or by voluntarily remaining poor and . . . that such households are 'relatively unstable,' thereby increasing the difficulty of detecting such abuses." *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973).[106]

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[106] Here, the State only argues that "*some* employable persons may voluntarily terminate their employment" in order to obtain assistance. Brief for Appellant, p. 8 (Emphasis added).

This Court rejected this purported justification and held that the statute violated the equal protection principles of the Fifth Amendment's Due Process Clause. The Court stated:

> "But even if we were to accept as rational the Government's wholly unsubstantiated assumptions concerning the differences between 'related' and 'unrelated' households, we still could not agree with the Government's conclusion that the denial of essential federal food assistance to *all* otherwise eligible households containing unrelated members constitutes a rational effort to deal with these concerns." *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 535-536 (emphasis in original)

The rationale of *Jimenez* and *Moreno* is applicable to the instant case. The device of the statutory presumption of a wrongful purpose for employment termination does not constitute a "rational effort" to deny public assistance only to persons who in fact leave their jobs for the purpose of qualifying for public assistance. First, while the statutory presumption is rebuttable on its face, it is clear from the record that plaintiffs actually had no opportunity to rebut the presumption when they applied for assistance, prior to the imposition of the sanctions, and generally during the entire seventy-five day sanction period. See Point II, *supra*. There is no evidence that any of these persons in fact left their employment in order to qualify for assistance.[107] It is simply irrational for the

[107] The denial of assistance based on a presumed rather than actual wrongful purpose for terminating employment conflicts with the "basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 175 (1972); *Felton v. United States*, 96 U.S. 699, 703 (1878) (To inflict a penalty where there is no culpability "would shock the sense of justice of everyone."). *Accord, Great Atlantic & Pacific Tea Co. v. Ervin*, 23 F. Supp. 70, 82 (D. Minn. 1938) (three-judge court) (Sanborn, J.).

State to impose sanctions and deny large numbers of needy persons badly needed assistance on the basis of presumed facts, and to only attempt to determine the actual facts after the termination of the sanction period, and after the harm has been done.

In *Owens v. Roberts*, 377 F. Supp. 45 (M.D. Fla. 1974) a three-judge court held that a statutory rebuttable presumption that certain transfers of property were made for the purpose of qualifying for welfare benefits, which was rendered conclusive in operation, created "a patently invidious discrimination" in violation of the Equal Protection Clause. *Id.* at 51. The court determined that:

> "(t)he arbitrariness and irrationality of this conclusive and automatic attribution of fraudulent intent without considering such factors as economic coercion, ignorance or the good faith of the claimant plainly flies in the face of the altruistic purpose underpinning welfare legislation." *Id.* at 52.

This rationale is directly applicable to the instant case.

The State has other means available which it could employ to rationally deny assistance to persons who in fact terminated their employment in order to qualify for public assistance. See *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 536-537 (1973).

First, these determinations can certainly be made on the basis of neutral fact finding without the utilization of any presumption. As defendant himself states, "This determination would have to be made even if the district court opinion were affirmed. . . ." Brief for Appellant, p. 47. *Accord*, A. 449. A post-judgment administrative letter issued by a Deputy Commissioner

instructed all local commissioners that they must determine whether a person "has *in fact* quit his employment for the purpose of qualifying for such assistance. . . ." (A. 632) (emphasis in original). A pre-judgment informational letter set forth some of the factors which are relevant in making this determination. (A. 455). A person's motive in terminating employment can be inferred from such facts as a person's employment history, terms and conditions of employment, efforts to adjust employer-employee differences, reasons given for job termination, and efforts to find new work or other means of support prior to seeking assistance. *Cf. Hawk v. Fenner*, 396 F. Supp. 1, 8 (D.S.D. 1975) (relevant factors to make case by case determinations of bona fide residence for welfare eligibility).

In addition, assuming *arguendo* that the State has a legitimate interest in utilizing a presumption, the State can further its interests as well as the interests of its needy citizens by limiting the use of the presumption to a hearing, and by determining that a person in fact terminated his employment for the purpose of qualifying for public assistance prior to the imposition of a sanction. *Cf. Adler v. Board of Education*, 342 U.S. 485, 495 (1952).

The State's "mere objective" of eliminating a timely and meaningful fact finding procedure with respect to persons sanctioned under the challenged statute is "the very kind of arbitrary legislative choice" forbidden by the Equal Protection Clause. *Reed v. Reed*, 404 U.S. 71, 76 (1971). The administrative burden and expense of modifying its procedures to ensure that the only persons sanctioned are those who in fact left their jobs

in order to qualify for assistance cannot serve as a rational justification for depriving plaintiffs of meaningful factual determinations. *Frontiero v. Richardson*, 411 U.S. 677, 690-691 (1972); *Stanley v. Illinois*, 405 U.S. 535, 540-541 (1970); *Goldberg v. Kelly*, 397 U.S. 254, 261, 265-266 (1970).[108]

The fact that there is no legitimate state interest to support the use of the presumption is made clear by the inconsistent positions taken in the Brief for Appellant. At one point, the State Commissioner argues that the presumption is necessary because otherwise "it would be virtually impossible" for the agency to determine why a person left his job. Brief for Appellant, p. 30. On the other hand, defendant states that "the presumption contained in NYSSL §131(11) McKinney Supp. 1974 merely clarifies the duty of the applicant to introduce evidence of his purpose in voluntarily terminating his employment. . . ." Brief for Appellant, p.. 51. Moreover, defendant concedes that if the district court judgment is affirmed, he will be able to make case by case determinations of the purpose of job termination. Brief for Appellant, p. 47. (A. 632). Finally, defendant conceded in the court below that "the actual practical effect to the State is unknown at this time, the effect of the presumption as opposed to findings of fact." (A. 690).

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[108] *Weinberger v. Salfi*, 95 S.Ct. 2457 (1975) is distinguishable in this respect. In *Weinberger*, the Court relied in part on the significant "administrative difficulties" that would result if a federal agency had to substitute case by case determinations for its present policy rule. *Id.* at 2476. Under these circumstances, the Court concluded that "any imprecision . . . was justified by . . . ease and certainty of operation." *Id.* at 2474. In the instant case, New York purports to make case by case determinations of why a person left his job.

In sum, it was irrational for the State to impose sanctions on persons who terminated their employment based on the assumption that they terminated their employment for the purpose of qualifying for assistance.

IV.

THE CLASS SHOULD BE MODIFIED TO EXCLUDE PERSONS IN THE AFDC CATEGORY

The named plaintiff, plaintiff-intervenors, and the other persons who participated in the proceedings before the court below were all applicants for Home Relief assistance. *N.Y. Social Services Law*, §158 (McKinney Supp. 1974). Defendant claims that the court below improperly included applicants for Aid to Families With Dependent Children (A.F.D.C.) assistance in the plaintiff class. Plaintiffs agree with defendant that the class should be modified so as to exclude those in the A.F.D.C. category, although not for the same reason set forth by defendant.

Defendant represented to the court below that "there are very few, if any, persons receiving A.F.D.C. who are directly affected. . . ." (A. 693. *Accord*, A. 691). Any person in the A.F.D.C. category who would be affected by the enforcement of the contested statutory presumption would have a substantial claim that the state statutory presumption conflicts with the Social Security Act. 42 U.S.C. §§601, *et seq. Shea v. Vialpando*, 416 U.S. 251 (1974); *Carleson v. Remillard*, 406 U.S. 598 (1972); *Lewis v. Martin*, 397 U.S. 552 (1970); *King v. Smith*, 392 U.S. 309 (1968). Ordinarily, the district court is required to reach this claim prior to

resolving the constitutional claim. *Hagans v. Lavine*, 415 U.S. 528 (1974).

The Social Security Act claim was neither raised nor argued in the court below, or by the defendant in this Court. Under these circumstances, and particularly in light of the representation of defendant that few, if any, A.F.D.C. persons are affected by the contested statute, the class should be limited to persons in the Home Relief category. Fed.R. Civ.P. 23 (c)(1)(4).

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the three-judge court should be modified to exclude applicants for Aid to Families With Dependent Children from the plaintiff class, and that in all other respects the judgment of the three-judge court should be affirmed.

October 15, 1975.

Respectfully submitted,

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Counsel for appellees gratefully acknowledge their appreciation for the assistance of Mark Imber and Kitty Huebbe in the preparation of this Brief.

Appendix "A"

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

In the Matter of the Appeal of
ALLEN PHILLIPS

DECISION AFTER FAIR HEARING

from a determination by the Westchester County Department of Social Services (hereinafter called the agency)

A fair hearing was held at White Plains, New York, on April 4, 1974, before, William Gorton, Hearing Officer, at which the appellant, the appellant's representative and representatives of the agency appeared. The appeal is from a determination by the agency relating to the denial of an application for home relief. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

(1) The appellant applied for public assistance, and the agency denied the appellant's application on March 8, 1974.

(2) The appellant was employed, and his employment was terminated due to his being tardy on one occasion, and for the addition reason that the employer claimed he wasn't dressed properly for his job.

(3) The appellant has in the past worked for the same employer and the employer never complained about his clothing.

(4) The appellant was only late on one occasion when he missed his train.

Section 385.7(a)(1) of the Regulations provides for the discontinuance or denial of assistance where there is a voluntary termination of employment for the purpose of qualifying for assistance. The record establishes that the appellant did not provoke his discharge for the purpose of qualifying for public assistance.

DECISION: The determination of the agency is not and cannot be affirmed. The agency is directed to take appropriate action in accordance with the foregoing decision pursuant to the provisions of Section 358.22 of the Regulations of the State Department of Social Services.

DATED: Albany, New York

/s/Abe Lavine
Abe Lavine
COMMISSIONER

By Carmen Shang

Appendix "B"

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

In the Matter of the Appeal of

SHIRLEY MILLER

DECISION AFTER FAIR HEARING

from a determination by the Dutchess Department of Social Services (hereinafter called the agency)

A fair hearing was held at Poughkeepsie, New York, on February 19, 1974, before John Burke Hearing Officer, at which the appellant, the appellant's representative and representative of the agency appeared. The appeal is from an agency denial of an application for home relief. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

(1) Appellant, age 35, resides alone.

(2) On January 14, 1974, appellant applied for public assistance; her application was denied on the basis that she had provoked her discharge and thus voluntarily terminated employment with the purpose of qualifying for public assistance.

(3) On December 14, 1973, the appellant was fired from her job for being undependable in that her work attendance had been irregular.

(4) Appellant became pregnant in November of 1973; her pregnancy was terminated on December 28, 1973.

Section 131(10) of the Social Services Law provides that a person who voluntarily terminate employment shall be ineligible for public assistance for 75 days unless otherwise required by Federal Regulation. In this case the agency determined that the appellant had provoked her discharge and therefore was subject to such a sanction. The record, however, clearly established that during the period in which appellant was absent from work, she was under emotional strain and was in the initial stage of pregnancy and did not voluntarily provoke her discharge. The determination of the agency, therefore, was incorrect. The agency determination to deny appellant's application is reversed; the agency is directed to issue a grant of assistance to appellant retroactive to the date of application and to issue a grant thereafter in accordance with verified need.

DECISION: The determination of the agency is not and cannot be affirmed. The agency is directed to take appropriate action in accordance with the foregoing decision pursuant to the provisions of Section 358.22 of the Regulations of the State Department of Social Services.

DATED: Albany, New York

/s/Abe Lavine
Abe Lavine
COMMISSIONER

By Carmen Shang
Carmen Shang
ASSISTANT COMMISSIONER

APPENDIX "C"

STATE OF NEW YORK

DEPARTMENT OF SOCIAL SERVICES
1450 Western Avenue
Albany, New York 12203

Administrative Letter	Transmittal No.:	74 ADM-186
	Date:	Dec. 24, 1974
To:	Commissioners of Social Services	
Subject to:	Clarification of 74 ADM-181 Sanctions for Voluntarily Terminating Employment Milne, et al v. Lavine, et al	
Suggested Distribution:	All Public Assistance Staff	

At a hearing before Judge Wyatt, USDC:SDNY on December 19, 1974, it was indicated by the court that Administrative Letter 74 ADM-181 issued December 18, 1974 could possibly be improperly interpreted. Therefore, in order to avoid any misunderstanding, you are instructed as follows:

You are not to deny, discontinue, or reduce assistance in the Aid to Dependent Children or Home Relief programs unless you find from all available evidence as a *fact* that the applicant or recipient has quit his or her employment for the purposes of qualifying for assistance or a greater amount thereof.

The Judge at this same hearing ORDERED in addition to the Judgment of December 13, 1974

> "* * * that a letter be sent on or before January 6, 1975, to all those members of the class denied *home relief* assistance since November 12, 1974 advising such members that they may reapply for such assistance retroactive to November 12, 1974 and are free to ask for legal advice as they may see fit * * *"

The class consists of all persons who were and may have been denied *Home Relief* between November 12, 1974 and December 13, 1974 by the imposition of the 75 day sanction under New York Social Services Law, §131(11) (McKinney Supp. 1974) and 18 N.Y.C.R.R. §385.7.

This means you are to review the files and send letters no later than January 6, 1975 in accordance with the Order of the Court as above indicated. Local Commissioners should report compliance with the Order of the Court by completing and returning the form attached.

/s/[Illegible]
Deputy Commissioner

FILING REFERENCE

SSL 131(11)	Bulletin
Dept.Regs. 385.7(b)	26
Inf. Letter–74 INF-19	